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Director's Decisions for California

Minerals

1969-1970

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appeal to Sec. A-31113

Mining Claims: Discovery 3413

It is proper to declare placer mining claims null and void for the lack of a discovery of a valuable mineral deposit where the claims were located in 1962 for deposits of nonmetallic materials which are determined to be common variety materials not subject to location under the mining laws since the passage of the act of July 23, 1955.

Mining Claims: Common Varieties of Minerals 3511

Deposits of massive granitic rock and decomposed granodiorite (or quartz diorite) which are the country rock of the area and do not possess any special or distinct properties over other commonly available and similar materials and may be used for the same purposes as other commonly available materials, and as to which it is not shown that they would command a significantly higher price in the market place over other available materials which may be used for the same purposes, are properly determined to be common varieties within the meaning of the act of July 23, 1955.

Mining Claims: Generally 3400

The Building Stone Act of August 4, 1892 (30 U.S.C. § 161), which is a part of the mining laws, was amended by the act of July 23, 1955, which removed common varieties of stone, gravel and other materials from the operation of the Mining Laws.

United States v. Bedrock Mining Co., Inc., et al., Riverside Contest No. 04871-B (January 16, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JAN 31 AM 10 00

In reply refer to:
704
Contest No.
Riverside 04871-B

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 16, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant

v.

Bedrock Mining Co., Inc.,
Norman E. Rudolph, Patricia E.
Rudolph, Philip W. Peter, and
Lynn Peter,
Contestees

Involving the Breakwater, Breakwater Nos. 2 to 6, inclusive, Flintstone, and Flintstone Nos. 2 to 9, inclusive, placer mining claims, located in Secs. 31 and 32, T. 6 S., R. 5 W.; Sec. 36, T. 6 S., R. 6 W.; and Sec. 1, T. 7 S., R. 6 W., S.B.M., California (within the Cleveland National Forest).

Decision Affirmed

Bedrock Mining Co., Inc., Norman E. Rudolph, Patricia E. Rudolph, Philip W. Peter, and Lynn Peter have appealed from a Hearing Examiner's decision, dated June 19, 1968, which declared their above-named mining claims null and void because each claim lacks a discovery of a valuable mineral deposit. [1]

This proceeding was initiated at the request of the Forest Service, U. S. Department of Agriculture, by a contest complaint containing the following charges:

a. A discovery of a locatable material has not been made and maintained.

b. The land is nonmineral in character.

c. The land is not chiefly valuable for building stone.

The contestees filed timely answers denying these charges, and a hearing was held at Los Angeles, California. William L. Johnson, a Forest Service mining engineer, testified for the contestant, and Philip Peter, a duly qualified mining engineer, testified in behalf of the contestees.

These claims were all located on December 15, 1962. They are in the Cleveland National Forest near the boundary between Riverside and Orange Counties, California. The claims cover deposits of decomposed granitic material and massive granitic rock which the contestant's witness calls granodiorite while the contestees' witness refers to it as quartz diorite. The

---

[1] Portions of the lands embraced by the subject claims were previously declared null and void *ab initio* by the Riverside District and Land Office because they had been withdrawn by Public Land Order No. 3134 of July 30, 1963, the segregative effect of which was effective as of December 16, 1958.

only issue to be determined in the case is whether this deposit is a common or an uncommon variety of mineral materials within the contemplation of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), which act removed common varieties of certain materials from the category of valuable mineral deposits which are subject to the operation of the mining laws. As the subject claims were located subsequent to that act, the claims would be invalid if the material is, in fact, a common variety. See United States v. Laura Duvall and Clifford F. Russell, 65 I.D. 458, 461 (1958).

Most of the area covered by the subject claims was formerly included in mining claims located in 1956 by Samuel Duvall and others. The Government brought a contest against the Duvall claims, which involved the same materials and the same argument as in the instant case, i.e., whether the materials are granodiorite or quartz diorite. In a final determination in the Duvall case the Department declared the claims null and void in United States v. Laura Duvall and Clifford F. Russell, supra. In holding the materials to be common varieties, the Department said:

> The contestant's evidence was entirely to the effect that the granodiorite (or quartz diorite) was a common variety of stone, that it constituted the country rock of a widespread area, and that the granitic rock was also part of the country rock of the area. The locators' evidence to the contrary consisted of a map (Ex. H) prepared by Rene Engle, a geologist, which indicated a deposit of quartz diorite at the site of the placer claims. The map cannot of itself overcome the persuasiveness of the testimony of the Government geologists who examined the area in question. Therefore, it is my conclusion that the granodiorite (or quartz diorite) is of widespread occurrence, is the country rock of the area, and is a common variety of stone.
>
> The contestees assert that despite this the granodiorite or quartz diorite is still locatable under the mining laws because it is usable as a road base material without processing. However, assuming that the deposit has this virtue, it still does not distinguish it from all the other similar decomposed granitic material in the general area. * * *.
>
> The deposits on the claim do not have a special and distinct economic use value over and above the general run of such deposits.
>
> Similarly the massive granitic rock on the claims is part of the country rock of the area, is of widespread occurrence, and is a common variety of stone. Therefore, it is not locatable under the mining laws.

The contestant's witness testified that he first examined the area of the subject claims in 1956 in connection with the Duvall claims, that the material claimed by the present contestees is the same as that involved in the Duvall contest, and that the present claimants were going to use it as fill, sub-base and rip-rap. He said that the material in the area of

the claims lying outside the area covered in the Duvall case is essentially the same material involved in Duvall, being a decomposed, weathered granitic rock with large residual boulders lying on the surface, and is actually the country rock of a large area. On cross-examination, he said that he is familiar with the Stringfellow Quarry near Riverside, which is about 30 miles from the subject claims, that he knows of a quarry in Colton which is a little farther away, while the quarries on Catalina Island are a little closer than the other two, being about 25 miles away. He further stated that a metavolcanic rock from Catalina Island is used as base for the construction of breakwaters in Long Beach Harbor, while a blue granite from the Stringfellow Quarry is used for cap rock. The rock on the subject claims is not blue granite as found in the Stringfellow Quarry.

The contestees' witness testified that the material is a decomposed quartz diorite, in some instances, a decomposed granite, in other instances, boulder granite, float, and in-place massive quarry-quality granite. He said there is an immediate market along the coastline for use for breakwaters and dikes, as ballast material along railroads, in monument stones and building stones, and that it would appear that the material on these claims is ideal for use as a cap rock in the construction of the Dana Point marina, which has been earmarked for construction, or for any other offshore structure. The subject claims would be the nearest point from which rock could be obtained for the Dana Point project. He testified that he has not supplied any rock as yet, but has turned down orders because of threatened suits by the Forest Service to recover damages for trespassing. Minor uses would be for sewage filter floors, aggregates, road ballast, highway fill, and trap rock. He would classify the quarry-quality granite as bluestone granite, having special economic value because it is very hard and very dense material. He mined in the Riverside area and was obtaining $2.50 a ton for his material. He indicated that other material mined near Cariso brings $3 per ton. He estimated a price of $6 a ton, F.O.B. Dana Point for material from the subject claims, and understands that the price is $7.50 a ton from the Stringfellow Quarry.

On cross-examination, the contestees' witness stated that quartz diorite has a quartz content of 60 to 70% while decomposed granite runs from 40 to 50%, the economic significance attributable to this being that with more quartz content the quartz diorite as a harder and more durable material. He identified the material as quartz diorite merely from visual observations and past experience. They would probably sell the decomposed quartz diorite for the manufacture of asphaltic concrete, for use in filtering and for road fill, with the major use likely to be for road fill. The boulder granite would probably be sold for breakwater construction.

The Hearing Examiner held that the general mining laws, including the Building Stone Act of August 4, 1892 (30 U.S.C. § 161), were amended by section 3 of the Act of July 23, 1955, _supra_. He relied on _United States_ v. _Duvall and Russell_, _supra_, and, in holding that the deposits are a "common variety," he said:

> The subject decomposed granite and quartz diorite deposits comprise the country rock of the area and are of widespread occurrence. While the deposits may be suitable for many uses, it has not been shown that they possess a distinct special economic value for such uses over and above the normal uses of the general run of such deposits. There is no evidence in the record that the deposits have any distinct and special properties which would render them commercially valuable for use in a manufacturing, industrial, or processing operation.

In this, we concur. Recently the Department has refined its test for determining whether a deposit of building stone or other substance listed in section 3 of the act of July 23, 1955, supra, is of a common variety no longer locatable under the mining laws since July 23, 1955, or if it is locatable as an uncommon variety having a distinct and special value. The determination may be made (1) by ascertaining whether the deposit has some property making it useful for some purpose for which other commonly available materials cannot be used which gives it distinct and special value, or (2) if used for the same purposes as minerals of common occurrence by determining if it has some property which gives it a special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other materials. See United States v. U. S. Minerals Development Corp., 75 I.D. 127 (1968); United States v. Gene DeZan et al., A-30515 (July 1, 1968); and United States v. R. W. Brubaker et al., A-30636 (July 24, 1968).

None of the uses proposed by the contestees' witness requires any special distinct properties over other commonly available and similar materials, unless it be for use as cap rock in breakwater construction. There is no probative evidence that the material from the subject claims would be acceptable for this purpose, and the demand for material for this purpose appears to be adequately satisfied from other sources in the general area. The Department has already determined that the rock is the country rock of the area, and we also so hold. The contestees' witness estimated that the subject material would bring a price of $6 a ton, F.O.B. Dana Point, while it was his understanding that rock from the Stringfellow Quarry brings $7.50 a ton, and material from other quarries brings $2.50 and $3 per ton. This does not indicate that the subject material would command a significantly higher price in the market place. Therefore, the material is a common variety and not a valuable mineral deposit within the meaning of the mining laws.

The appellants state that the act of July 23, 1955, supra, provides for exceptions to the Multiple Use Act under which the instant claims would qualify. This generalized contention has already been adequately covered in our discussion hereinabove.

They further contend that a review of the Solicitor's opinion on the Marketability Rule, M-36642, 69 I.D. 145 (1962) sets forth rules for determining what is "common," and that the economics of the situation not only clearly cover the marketability requirements, but any reasonably prudent man would expend every effort to reach such market. The Solicitor's opinion was not intended to set forth criteria for determining what is a common or an uncommon variety of material as contemplated by the act of July 23, 1955, supra. It was merely to explain and clarify the marketability test which has long been used by the Department as a complement to the "prudent man" test of Castle v. Womble, 19 L.D. 455, 457 (1894), in determining whether or not a discovery has been made. Furthermore, marketability of the deposit has no bearing in this case whatsoever, since the material has been determined to be a common variety, and not subject to location under the mining laws in 1962. It would have had a bearing only if the claims had been located prior to July 23, 1955, in which case marketability before July 23, 1955, would have to be proven.

Lastly, the appellants contend that the Building Stone Act of August 4, 1892 (30 U.S.C. § 161) was not modified or amended by the act of July 23, 1955, as held by the Hearing Examiner. However, the Building Stone Act, which is a part of the mining laws, was amended by the act of July 23, 1955. See the decision of the United States Supreme Court in United States v. Coleman, 390 U.S. 599 (1968).

For the reasons given, the Hearing Examiner's decision of June 19, 1968, is hereby affirmed.

Bedrock Mining Co., Inc., Norman E. Rudolph, Patricia E. Rudolph, Philip W. Peter and Lynn Peter are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all fifteen claims adversely affected by this decision, the total filing fee will be $75. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Mr. Charles F. Lawrence
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:

Mr. Norman E. Rudolph, Attorney at Law (Certified Mail)
Mr. Charles F. Lawrence
Bedrock Mining Co., Inc.
Philip W. Peter and Lynn Peter
Patricia E. Rudolph
Office of the Hearing Examiners, Sacramento
Regional Forester, Forest Service, USDA
Office of the General Counsel, USDA
Forest Service, Division of Watershed Management, USDA (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Gower Federal Service
OPD
Appeals List No. 1

appeal to Sec A-31120
affirmed - 4-17-70

Mining Claims: Power Site Lands (Public Law 359) 3536.1(b)

A mining claim located before August 11, 1955, on land within an existing power site classification is null and void because the land was then unavailable for mining location, and the Mining Claims Rights Restoration Act of 1955 did not validate such claims.

Mining Claims: Equitable Adjudication 2011.1

The authority to apply equitable principles under 43 U.S.C. § 1161 is limited by 43 U.S.C. § 1164 to cases where the law has been substantially complied with, and a request to apply equitable principles to mining claims cannot be granted where the claims were located at a time when the lands involved were included in a power site classification because the claims are null and void *ab initio*, and are not in compliance with the law.

Pacific Coast Gasoline Company, R-1478 (January 30, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 FEB 7 AM 10 00

In reply refer to:
704
R-1478

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

January 30, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Pacific Coast Gasoline Company	:	Mineral Patent Application
	:	embracing the Dial & Skinner
	:	Sand Pit #1 Mining Claim and
	:	the Dial and Skinner Sand and
	:	Rock Plant Mill Site.

Decision Affirmed

Pacific Coast Gasoline Company has appealed from the October 29, 1968, decision of the Riverside District and Land Office, which declared the subject mining claims null and void and rejected mineral patent application R-1478 embracing the claims, inasmuch as the claims were located at a time when the lands included therein were withdrawn from mining location.

The record reveals that both claims were located on July 27, 1953, on portions of Lot 4 of Section 4, T. 8 N., R. 23 E., S.B.M., California, which land, inter alia, had been reserved from entry, location, or other disposal under section 24 of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. § 818 (1964), by Power Site Classification No. 55 of June 22, 1923. The lands had not been restored to location or entry under section 24 of the said Federal Power Act.

In holding the claims to be null and void, the Riverside District and Land Office said that lands in power site withdrawals were not open to location of mining or mill site claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955, 30 U.S.C. §§ 621-625 (1964), and any attempted location before that time and subsequent to the withdrawal of the land for power site purposes is null and void unless the lands were restored to entry under section 24 of the Federal Power Act, supra; that the lands involved were not so restored; and that the 1955 act did not validate mining or mill site claims located prior to the date of the act on lands which were withdrawn for power site purposes.

The decision appealed from is correct. The Department has consistently held that mining claims located before the passage of the Mining Claims Rights Restoration Act of 1955 on lands within an existing power site withdrawal are null and void because the land was then unavailable for mining location. The 1955 Act did not validate such claims. See Wayne England, A-30088 (April 13, 1964), and the cases cited therein. This interpretation of the law is embodied also in the Department's regulations in 43 CFR § 3536.1(b). Also see Armin Speckert, A-30854 (January 10, 1968).

Although avowing the principles of law set forth in the decision below, the appellant nevertheless alleges that neither it nor its predecessors in interest had any knowledge that the lands were withdrawn at the time the claims were located until it received the decision below, and that it and its predecessors in interest have spent thousands of dollars in labor and improvements in developing the claims over the past 15 years. It thus contends that the case is an excellent one for the application of equitable principles in its favor under the authority of 43 U.S.C. § 1161 (1964), which reads: "The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity * * * all cases of suspended entries * * *."

The notation of the withdrawal on the official records of the land office constituted constructive notice to the locator and his successors in interest that the lands were withdrawn and not subject to location. The appellant was at liberty to inform itself by inspection of the records, and it is chargeable with knowledge of the legal consequences of the facts that inspection of the records would have disclosed to it. It has no standing to complain of any inconvenience or disappointment it may have sustained in learning that its labor and expenditures in developing the claims did not create in it any rights in the land. Ted W. Fay, A-29781 (January 30, 1964); The Dredge Corporation, 65 I.D. 336 (1958).

The authority to apply equitable principles under 43 U.S.C. § 1161 (1964) is limited by 43 U.S.C. § 1164 (1964) to cases "* * * where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; * * *." (Emphasis added). Mining claims located on lands not subject to location because they are in a power reserve are null and void ab initio, and are not in compliance with the law. Cf. United States v. Ida McClarty Johnson, Administratrix, A-30853 (March 7, 1968), holding that where there is no mineral discovery on a mining claim there is no compliance with the law and, therefore, there is no equitable jurisdiction over the case.

The appellant further contends that, although the lands were withdrawn in 1923 for power purposes they were never used for such purposes; thus, the Federal Government was not deprived of the use of the lands, and the Mining Claims Rights Restoration Act of 1955 could be considered as having taken effect nunc pro tunc, so as to validate the original locations. However, the 1955 Act does not operate retroactively to validate claims located before the date of its enactment and subsequent to a withdrawal. See Wayne England, supra. The fact that the lands may never have been used for power purposes has no bearing. It is the legal effect of a withdrawal that is determinative of the question of the availability of land for mining entry, and the actual use to which the land has been put or to which it presently is put is immaterial. David W. Harper, 74 I.D. 141, 149 (1967). In Harper the Department held (syllabus): "Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until the revocation or modification of the order of withdrawal, and it is immaterial whether the

lands are presently being, or have ever been, used for the purpose for which they were withdrawn."

One other matter is deemed worthy of mention, although it is not material to a decision in this case, and we do not attempt to decide it herein. It is merely brought out for the appellant's consideration. The appellant states that if relocations of the claims had been made at the time of the Mining Claims Rights Restoration Act of 1955, there is no question but that appellant's mineral patent application would have been approved because the requirements as to discovery of valuable minerals and expenditures of monies had already been made. It is noted from the patent application that the valuable minerals claimed are sand and gravel. The appellant's attention is called to the intervening act of July 23, 1955, 30 U.S.C. §§ 601 et seq., section 3 of which removed common varieties of sand, stone, gravel, etc. from the category of valuable minerals locatable under the mining laws.

The Riverside District and Land Office decision is, therefore, hereby affirmed.

Pacific Coast Gasoline Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Eric R. Van de Water, Ball, Hunt, Hart and Brown, Attorneys at Law
(Certified Mail)
Mr. E. I. Read, Read & Miguelez, Attorneys at Law
Pacific Coast Gasoline Company
Hon. Craig Hosmer, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
OPD
Gower Federal Service

Materials Act: Mineral Material Disposals 3610

Applications to have decorative rock offered for sale pursuant to the Materials Act are properly rejected where it is determined, and not refuted, that the removal of the rock would not be in the public interest.

Walter Scott et al., R 07240 etc. (February 14, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 FEB 28 AM 10 00

In reply refer to:
142
R 07240
07291

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 14, 1969

CERTIFIED MAIL
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DECISION

Walter Scott and :
Mike Figueroa :

Materials Act

Decision Affirmed

The above-named appellants have appealed from the decision dated November 28, 1967, of the district and land office at Riverside, California, which rejected the appellants' respective applications to have decorative rock exposed on certain lands in the Big Maria and Little Maria Mountains offered for sale by competitive bidding pursuant to the Materials Act of July 31, 1947, as amended, 30 U.S.C. §§ 601, 602 (1964).

The decision appealed from cited departmental regulation 43 CFR 3610.1(b), which provides that no sale of material shall be made where the authorized officer determines that the aggregate damages to public lands and resources will exceed the benefits derived from such disposal. The land office manager determined that the sale and removal of the rock would disturb the surface watershed values in the area. 1/

The appellants make no effort to refute the finding of the land office manager, but allege that the material in issue is dolomite, and assert that this mineral is locatable under the general mining laws.

The Materials Act of July 31, 1947, *supra*, provides in pertinent part:

> The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of * * * stone * * * on public lands of the United States, * * * if the disposal of such mineral * * * is not otherwise expressly authorized by law * * * and would not be detrimental to the public interest. * * *

1/ The area is proposed for management under the Classification and Multiple Use Act of September 19, 1964, 43 U.S.C. §§ 1411-1418 (1964).

Consequently, if true, the allegation in the appeal that the rock in issue is locatable under the general mining laws would merely be another reason to require the rejection of the appellants' applications, and does not show that the decision appealed from is erroneous. Minerals that are locatable are expressly disposable under the general mining laws, and, for that reason, are excepted from sale under the Materials Act, as stated in the quoted part of that statute. In this connection it is noted that the Supreme Court recently held that common varieties of building stone are not locatable after enactment of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964). See United States v. Coleman et al., 390 U.S. 599 (1968).

Since the appellants have not shown error in the finding of the decision appealed from, that it would be detrimental to the public interest to sell the materials, there is no reason at this time to consider whether the rock is locatable or a "common variety" of stone. 2/ The appellants have failed to show wherein the decision appealed from is erroneous. Accordingly, the district and land office decision is affirmed.

Messrs. Scott and Figueroa are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. Thus, if the appeal includes both applications adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If

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2/ In United States v. Gene DeZan et al., A-30515 (July 1, 1968), the Department discusses these deposits of dolomite in the form of "driftwood" rock which occur over a widespread area on the Little Maria and Big Maria Mountains. The Department affirmed the Hearing Examiner's finding in that case that Mr. DeZan et al. had not shown that such deposits possessed any distinct economic value for use as building stone over and above the general run of such deposits, and held that the deposits are a "common variety" within the meaning of section 3 of the act of July 23, 1955, supra, and not subject to location under the mining laws.

an appeal is filed, the appellants will have the burden of showing wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Carl Cress, Jr., Attorney for Appellant Walter Scott (Certified Mail)
Mr. Mike Figueroa (Certified Mail)
Mr. Walter Scott
300 (12)
200
Gower Federal Service
Appeals List No. 1

appeal to Sec A-31133
affirmed 3-4-70

Mining Claims: Common Varieties of Minerals 3511

Decomposed granite and building stone, which are of widespread occurrence and the country rock of the area, which can be produced advantageously but which are used only for the same purposes as other deposits of the same materials, and which have not been shown to possess a distinct, special economic value, or command a higher price in the market, for uses over and above the normal uses of the general run of such deposits, are common varieties and are not locatable under the mining laws after the effective date of the act of July 23, 1955.

Mining Claims: Discovery 3413

Where mining claims were located before July 23, 1955, for deposits of common varieties of minerals of widespread occurrence, such deposits, in order to constitute valuable mineral deposits, must, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, be shown to have been of such value that they could be mined, removed and disposed of at a profit on or before the date of passage of the act of July 23, 1955; and where the claimants have failed to prove by a preponderance of the evidence that the materials could have been extracted, removed and marketed at a profit prior to July 23, 1955, the claims are properly declared null and void for the lack of a discovery of a valuable mineral deposit.

United States v. Amos D. Robinette and Lena S. Robinette, Riverside Contest 05605 (February 17, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 MAR 7 AM 10 00

In reply refer to:
142
Contest No.
Riverside 05605

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

February 17, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant

v.

Amos D. Robinette and
Lena S. Robinette,
Contestees

Involving the Robinette Rock Quarry Nos. 3, 4, 5, and 6 placer mining claims, located in Sec. 9, T. 3 N., R. 7 W., S.B.M., California (within the San Bernardino National Forest).

Decision Affirmed

Amos D. Robinette has appealed from a Hearing Examiner's decision, dated July 30, 1968, which declared the above-named placer mining claims null and void for the lack of a discovery of a valuable mineral deposit within the limits of any of the claims, and which rejected mineral patent application Riverside 05605 covering the said claims.

As the mining claims are located within the San Bernardino National Forest, this proceeding was initiated by a contest complaint issued by the Manager of the Riverside District and Land Office at the request of the Forest Service, United States Department of Agriculture. The complaint contained the following allegations:

a. There is not disclosed within the boundaries of any of the claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery, nor is such land chiefly valuable for building stone.

b. The land embraced within the claims is nonmineral in character.

The contestees filed a timely answer to the complaint, and hearings were held in San Bernardino and Sacramento, California, on March 9 and April 11 and 12, 1966. The Examiner's decision was rendered as a result of these hearings.

Lena S. Robinette, the wife of Amos D. Robinette, died shortly before the hearings, and her estate had not been probated, although the Robinettes' attorney explained that he had made application for Mr. Robinette to be appointed executor of her estate, and that Mr. Robinette was the sole beneficiary.

The Robinette Rock Quarry No. 3 claim was located on August 26, 1948, and amended on July 5, 1954. The other three claims were located on October 17, 1951. The claims are located near the town of Wrightwood, California.

Emmett B. Ball, a Forest Service mining engineer, testified that he examined the subject claims with Mr. Robinette and his son-in-law in August 1963. He introduced in evidence a map (Ex. 7) depicting the location of the subject claims, as well as the location of the nearby Placer X and Placer X Nos. 2, 3, 4, and 5 placer claims of the same claimants. 1/ He also introduced Exhibit 8, an aerial photograph on which he had drawn the outline of the subject claims and of two adjoining patented claims owned by the Robinettes. Mr. Ball stated that Mr. Robinette informed him that he wanted to use rock and decomposed granite from the claims to use in building walls, chimneys, and that he screened rock for leech lines for septic tanks, and used the decomposed granite for filling driveways. Mr. Robinette had used in the past about 500 tons of rock from the No. 6 claim and 100 tons from the No. 3 claim. Rock and decomposed granite such as found on the subject claims occurs all through the region on the north side of Wrightwood for a number of miles, and is the country rock of the area. There is a road on claims Nos. 3, 4 and 5 and several cuts where the road itself has been widened out, and a bulldozer cut near the road at the top of the ridge on Claim No. 4. The Forest Service sells decomposed granite for five to ten cents a ton and rock for fifteen to twenty-five cents a ton in place. The gneiss rock on the claims is the country rock of the area, and it also occurs on the claimants' patented claims which would be easier to get to because they lie between the subject claims and the highway.

Lynn Robert Biddison, a Forest Service employee, testified that during his four years as District Ranger on the National Forest he was in the Wrightwood area periodically to inspect the area for types of access available for fire equipment, and that, to the best of his recollection, there were no access roads to the subject claims, particularly to the top of the ridge. On cross-examination, he stated that there might have been a road to the lower part of claim No. 6, as he was not aware of the exact boundaries of the claims, but it was not up high on the ridge.

Dudley L. Davis, duly qualified as a mining engineer, testified for the contestees that he made a detailed examination of the subject claims in company with Mr. John Merrill. Five samples of the decomposed granite material were taken by Mr. Merrill and submitted to a laboratory for their findings and a microscopic examination. From the influence of these samples they calculated a total of 948,000 tons of decomposed granite which can reasonably be expected on the claims. The decomposed granite on the claims

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1/ The Placer X group of claims was the subject of a contest proceeding in which this office affirmed a Hearing Examiner's decision declaring the claims null and void for the lack of a timely discovery of a locatable mineral on any of the claims in United States v. Amos D. Robinette and Lena S. Robinette, Riverside 05104 (July 18, 1968).

consists of altered feldspar which has in part been converted to clay and mica, which are not found in ordinary sand and gravel. The significance of these constituents is that you can mix the material with ordinary sand and gravel to grow lawns, and you can mix it with other, more porous material for sub-grade material and for roadways. He stated that a small operator can afford to work this material on a very small profit margin of five or ten cents a cubic yard. The claims also contain large areas of ornamental or building stone. He was of the opinion that the decomposed granite on the claims can be mined at a profit.

On cross-examination, he stated that the material is not, in fact, decomposed granite but is a decomposed gneiss which has the trade name of decomposed granite. He admitted that gneiss rock is a rock of very extensive occurrence. Mr. Robinette could mine from any one of the four claims and make a profit. Mr. Davis did not know the quantity of materials absorbed by the market in which Mr. Robinette operates, but based his opinion that Mr. Robinette has mined and made a profit from similar operations in the area. He did not know where the material that Mr. Robinette has mined came from. The material is used for subgrade for roadways, for compacting soils which are too soft and friable to retain water for lawns, and as a road mix.

John D. Merrill, a qualified consulting engineering geologist, testified on behalf of the contestees that the properties that make decomposed granite special and different from common varieties of sand, gravel, backfill, soil, building stone, pumice, pumicite and cinders are its cohesion which derives from the clay content and its micaceous character and ability to be blended with other common varieties such as sand or gravel to make a cohesive mass or to decrease the porosity and permeability of these materials to make them less subject to erosion, with the result that these then become useful in construction, as in fills.

Mr. Merrill examined the subject claims beginning in March 1966 when he walked across them accompanied by Mr. Robinette and others. A report of his examination was received in evidence as Exhibit M. Decomposed granite as it is used in industry is easily compacted, as it attains a great deal of cohesion and strength under compaction techniques, whereas sand, although it becomes dense, will not become cohesive. Uses for decomposed granite might be as a filler or a road base or the sub-base for concrete work, or as a backfill behind walls, where a high degree of compaction is desired, at the same time providing a good deal of resistance to erosion. Rocks on the claims include marbleized or recrystallized limestones, granite gneisses, mica gneiss, hornblende gneiss, actinolite schist and gneisses. Recrystallized limestone is used for the construction of interior walls and surfaces and floors, if it is polished. It may be ground up and used for roofing granules, and in making roofing paper. The limestone on the subject claims is interstratified with other types of rocks. For this reason it would not be practical to separate it from the general mass of rock, but to use it as it occurs in mixture with the other rock for architectural purposes.

The deposit of decomposed granite is variable in thickness, ranging from a knife edge at the perimeter to as thick as 45 feet. The decomposed granite

could be used in the construction of road base or sub-base, as a non-erodible or highly compacted backfill, and for mixing with common varieties of sand or gravel to create a good quality fill or backfill. He has seen rock walls built in the area out of rock similar to that on the claims.

On cross-examination, Mr. Merrill admitted that occurrences of similar materials could possibly be measured in terms of square miles. Mr. Robinette informed him that he had sold rock from claim No. 6. He did not know what removals of decomposed granite had been made from any of the four claims. There are five or six pits on the claims but, to his knowledge, the material that was dug from the holes may still be surrounding the hole. The deepest cut was about 15 feet. He did not think it would be practical commercially to separate the limestone from the other rocks, and he did not know how much decomposed granite is sold in the Wrightwood area each year. Therefore, he was unable to say how much material could be marketed from the claims in any one year. He understands that Mr. Robinette is currently operating another claim in section 10, which is quite accessible, being very close to the highway.

Amos D. Robinette, in his own behalf, testified that the location of claim No. 3 was based principally on building rock which is a peculiar variety whereby he can get a specialty corner rock for fireplaces or piers that require so many corners. In 1951 or 1952 he sold some rock to a Mr. Tietz at $3 a cubic yard for construction of a rock house. The rock came principally from the No. 3 claim with some from the No. 6 claim. Also, in 1951 or 1952 he used rock from claims Nos. 3, 1, 2 and 6 for construction of two rock walls at Mariestella Camp on a contract price of $2,000, including labor and material. In 1948 he sold 50 yards of rock at $6 a yard for construction of the Centienella Girl Scout Camp. The rock came from the four different claims. In 1950 he sold 25 yards for construction of a fireplace at Mariestella for $6 per yard. Rock from the Nos. 1, 2, 3 and 6 claims was used in construction of the home of Mr. and Mrs. Steadman in 1954, for the construction of which he was paid $5,182.60. The Nos. 1 and 2 claims are his patented claims.

He based his location of claim No. 4 on decomposed granite and some clay; claim No. 5 on decomposed granite; and claim No. 6 principally for colored or ornamental rock. He sold about 20 yards of select rock for a fireplace for the Holiday Hills Cafe in 1950, and about 30 yards for a fireplace at a Y.M.C.A. Camp in 1944. He hauled no decomposed granite from the claims prior to 1962 when an access road was built. Since then he has hauled quite a lot of clay for yard and lawn work, and at least 100 yards of decomposed granite.

On cross-examination, Mr. Robinette stated that he was unable to recall the quantity of material sold from each claim. In April 1965 he had submitted to the land office a list of sales of stone for the years 1947 through 1950. This list shows sales totalling 215 cubic yards in 1947; 243 cubic yards in 1948; 153 cubic yards in 1949; and 242.5 cubic yards in 1950. A statement attached to the list of sales indicates that 25% of the sales should be credited to the Nos. 3 and 6 claims. The list indicates a sales price of $5 a cubic yard for most of the stone. He said he had sold stone between 1941 and 1947 but had lost his records of those sales. About 50% of the stone shown on the list of sales came from the Nos. 1 and 2 claims (which claims had been previously patented to him, and which are not involved in this proceeding), and the remainder from the Nos. 3 and 6 claims. Stone was removed from the No. 3 claim after 1951 but he could not recall the amounts. Nothing was taken off of claim No. 4 until 1962 when he got the road open, and he has done assessment work only on claim No. 5. Nothing but some decomposed granite had been removed from claim No. 6 after 1962 because "the rock business did fall off."

Mr. Robinette was questioned regarding testimony he gave at a previous hearing in Contest No. R 05104, which involved the validity of his Placer X claims in nearby section 10. He had introduced at that hearing, as Exhibits B, C and D, portions of his California Sales Tax Returns for portions of the years 1953, 1954, and 1955. These were introduced in the instant case as contestant's Exhibit 12. He had testified at the previous hearing that the material represented by these returns "would be everything from No. 10 /the Placer X claims in section 10/. Decomposed granite and some building rock, some wall rock."

Mr. Amos D. Robinette received patent to the Robinette Rock Quarry Nos. 1 and 2 claims, embracing 40 acres, on May 7, 1951. The patented claims adjoin the claims which are the subject of this proceeding. He stated in the patent application filed on January 28, 1949, that rock and sand sales from the No. 1 claim amounted to $3,500 and that rock sales from the No. 2 claim amounted to $500.

The principles of law governing the facts in this case, which involves decomposed granite and stone--nonmetallic materials of widespread occurrence--were briefly summed up by the Department recently in United States v. John C. Chapman et al., A-30581 (July 16, 1968), as follows:

> The Department has long employed the test of marketability as one of the criteria for determining whether or not a valuable mineral deposit has been discovered. That is, in order to be valuable, minerals must be marketable at a profit. This test has received judicial sanction as a proper complement to the long-accepted prudent man test of discovery enunciated in Castle v. Womble, 19 L.D. 455 (1894), and approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and subsequent decisions. United States v. Coleman, 390

> U.S. 599 (1968); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959). It is not enough to show that a market exists for a particular mineral, but it must be shown that the particular deposit itself which is claimed to be valuable can be mined and marketed at a profit. See United States v. Gene DeZan et al., A-30515 (July 1, 1968), and cases cited. Moreover, where the deposit is of a common variety of mineral removed from location under the mining laws by section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), as is the case here, it must be shown that mineral from the deposit could have been extracted, removed and marketed at a profit prior to July 23, 1955. United States v. E. J. Fife and Eugene M. Fife, A-28366 (September 19, 1960); United States v. Alfred Coleman, A-28557 (March 27, 1962), affirmed in United States v. Coleman, supra; United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965).

There is no question but that the decomposed granite and stone in the instant case are common varieties of such materials. The Hearing Examiner said that the Department has consistently held that materials of widespread occurrence, which can be produced advantageously but which are used only for the same purposes as other deposits of the same materials, are common varieties of material and are not locatable under the mining laws after 1955 since these advantages do not give them a special, distinct value, citing United States v. J. R. Cardwell and Frances H. Smart, A-29819 (March 11, 1964); United States v. R. R. Hensler, Sr., et al., A-20973 (May 14, 1964); and United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968). The Examiner concluded, and correctly so, that the subject deposits are of a common variety within the meaning of the act of July 23, 1955, supra, not subject to location under the mining laws after the date of the act, and, in support of the conclusion, he said:

> The decomposed granite and gneiss stone are of widespread occurrence in that area. While the deposits may be suitable for many uses, it has not been shown that they possess a distinct special economic value, or command a higher price in the market, for such uses over and above the normal uses of the general run of such deposits. There is no evidence in the record that the deposits have any distinct and special properties which would render them commercially valuable for use in a manufacturing, industrial, or processing operation.

Thus, it was encumbent on the mining claimant to show by a preponderance of the evidence that the materials could have been extracted, removed and marketed at a profit prior to July 23, 1955. This also includes a showing of accessibility, bona fides in development, existence of present demand, and other factors. Foster v. Seaton, supra.

In concluding that the materials on the subject claims were not marketable in 1955, the Examiner said that there is no evidence of any market or demand for the decomposed granite in 1955, as decomposed granite was not removed from any of the claims until 1962; that there is no evidence of any building stone having been removed from the Nos. 4 and 5 claims either before or after 1955; and that

> The Contestees' evidence of the sale and removal of stone from the No. 3 and No. 6 claims is vague and inconsistent. While the statement attached to the list of sales indicates that 25% of the sales "should be credited" to the No. 3 and No. 6 claims, Amos D. Robinette testified that 50% of the rock comprising those sales came from the two claims. * * *
>
> * * *
>
> The Contestees' evidence of material sales is further confused by the fact that they have removed stone from their adjoining patented No. 1 and No. 2 claims and their "Placer X" claims at the same time as stone was purportedly being removed from the No. 3 and No. 6 claims.
>
> * * *
>
> The Contestees' evidence is so vague, confusing, inconclusive and contradictory that it is impossible to arrive at an accurate finding as to the amount of rock which has been removed from the No. 3 and No. 6 claims either before or after 1955. It has merely been shown that the infrequent sales of small amounts of stone made between 1947 and 1961 consisted, in unspecified part, of stone removed from the No. 3 and No. 6 claims. * * *
>
> It is well settled that infrequent sales of small amounts of stone do not prove that the stone could be mined and marketed at a profit. United States v. Joe H. York and Jemima York, A-28806 (August 16, 1962), citing United States v. Jacobo Armenta et al., A-28248 (June 22, 1960) and United States v. Philip Jungert, A-28199 (April 14, 1960).

In their statement of reasons for appeal, the appellants made an extensive review and summary of the testimony and documentary evidence offered at the hearing, contending, in substance, that the involved materials are of uncommon varieties and that discoveries have been made upon the claims. But

the appellants have not brought forth anything which would warrant a change in the conclusions reached hereinabove. The record supports the finding of the Hearing Examiner that the contestees failed to prove a discovery of valuable minerals on the claims prior to July 23, 1955, by a preponderance of the evidence. See Foster v. Seaton, supra, for the burden of proof that must be borne by the contestees.

The appellants contend that the Examiner's decision was based on the narrow ground that sales of the materials must be made at once. It is true that the lack of sales or a paucity of sales are not the only criteria for determining whether materials can be mined, removed and marketed at a profit, although they raise a strong presumption that the materials were not marketable at a profit. There is no evidence that decomposed granite was removed from the claims until 1962; therefore, it was not established that the decomposed granite was marketable on July 23, 1955. Mr. Robinette's own testimony was that nothing was taken off of claim No. 4 until 1962, when he got the road open, and that he has done assessment work only on claim No. 5. This not only fails to establish marketability of the materials on these particular claims as of July 23, 1955, but also indicates a lack of bona fides in development of the claims. The few sales of rock which, from the evidence, may be attributed to the Nos. 3 and 6 claims prior to 1955, are insufficient in and of themselves to prove that the rock from the claims was marketable. Furthermore, Mr. Robinette stated that nothing but some decomposed granite had been removed from claim No. 6 after 1962 because "the rock business did fall off." No evidence was presented as to the costs of mining, removing and selling the rock, so as to determine whether the rock was sold at a profit, and some of the rock was used by Mr. Robinette in construction jobs on a contract basis.

The appellants have requested permission for oral argument of the case. We do not feel that an oral argument is necessary for a determination in this case. Therefore, the request for oral argument is denied.

For the reasons given, the Hearing Examiner's decision of July 30, 1968, is hereby affirmed.

Mr. Amos D. Robinette is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all four claims adversely affected by this decision, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is filed, the adverse party to be served is:

Mr. Charles F. Lawrence
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

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Office of Hearing Examiners, Sacramento
Regional Forester, Forest Service, USDA
Office of the General Counsel, USDA
Forest Service, Division of Watershed Management, USDA (12)
300 (6)
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Gower Federal Service
Appeals List No. 1

appeal to Sec A-31138 affirmed 3-4-70

Mining Claims: Common Varieties of Minerals 3511

Nonmetallic mineral materials of widespread occurrence, which can be produced advantageously but which are used only for the same purposes as other deposits of the same materials, and which have not been shown to have some property which gives them a special value for such uses as reflected by the fact that the materials command significantly higher prices in the market place than the other materials, are common varieties and are not locatable under the mining laws after the effective date of the act of July 23, 1955.

Mining Claims: Discovery 3413

Where mining claims were located before July 23, 1955, for deposits of common varieties of minerals of widespread occurrence, such deposits, in order to constitute valuable mineral deposits, must, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, be shown to have been of such value that they could be mined, removed and disposed of at a profit on or before the date of passage of the act of July 23, 1955; and where only two small sales were made of materials in 1964 and 1966 from claims that were located in 1954 and 1955, and where the claimants have failed to prove by a preponderance of the evidence that materials could have been extracted, removed and marketed at a profit prior to July 23, 1955, the claims are properly declared null and void for the lack of a discovery of a valuable mineral deposit.

United States v. Evelyn T. Harding et al., Riverside Contest 07088 **(March 5, 1969)**

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 MAR 27 AM 10 00

In reply refer to:
142
Contest No.
Riverside 07088

March 5, 1969

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. Evelyn T. Harding (formerly Evelyn T. Holgate), John K. Andrich, Martha A. Andrich, Chester B. Turner, and Winifred A. Turner, Contestees	:	Involving the Vincent Rock Quarry, Tootie and Martha Rock Quarry, and Carol and Johnny Rock Quarry, located in Secs. 8, 9 and 15, T. 3 N., R. 7 W., S.B.M., California (within the San Bernardino National Forest).

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision, dated July 17, 1968, which declared their Vincent Rock Quarry, Tootie and Martha Rock Quarry, and Carol and Johnny Rock Quarry placer mining claims null and void for the reason that each of the claims lacks a discovery of a valuable mineral deposit, within the meaning of the mining law.

The mining claims are located within the San Bernardino National Forest, and this proceeding was initiated by a contest complaint issued by the Manager of the Riverside District and Land Office at the request of the Forest Service, United States Department of Agriculture. The complaint contained the following allegations:

> a. There is not disclosed within the boundaries of any of the mining claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery, nor is such land chiefly valuable for building stone.
>
> b. The land embraced within the claims is nonmineral in character.

The contestees filed a timely answer to the complaint, joining the issues, and hearings were held in San Bernardino and Sacramento, California, on March 9 and April 11 and 12, 1966. The Examiner's decision was rendered as a result of the hearings.

These claims were located on October 6 and November 15, 1954, and on July 1, 1955, near the town of Wrightwood.

Emmett B. Ball, Jr., a Forest Service mining engineer, testified that he first examined the Carol and Johnny Rock Quarry and the Tootie and Martha Rock Quarry claims in company with Mr. Andrich, one of the claimants. The claims were located for decomposed granite and rock. Mr. Andrich informed him that he did not know of any sales having been made of the rock or decomposed granite from any of the three claims. Mr. Ball examined the Vincent Rock Quarry claim at a later date. He found several very small hand-dug pits, and stated that if any material had been removed it had to be carried out by backpack because the country was very steep and there were no roads or trails for pack animals. The decomposed granite on the claims is similar to decomposed granite surrounding the claims. The rock on the claims is a gneiss rock, and is the country rock of the area. It runs for a number of miles on the north side of the San Andreas Fault, which fault line runs through Wrightwood. The Forest Service customarily charges from 5 to 10 cents a ton for decomposed granite, and from 15 to 25 cents a ton for rock in place. There are sources of these materials on placer claims of Mr. Robinette that are closer to the highway and more accessible.

On cross-examination, Mr. Ball stated that the delivered price for decomposed granite in the Wrightwood area was about $2 a ton or a yard. He spent six hours examining the Carol and Johnny and the Tootie and Martha claim, and about three hours on the Vincent claim.

Dudley L. Davis, a duly qualified mining engineer, testified for the contestees that he examined the claims in the company of Mr. John Merrill. He calculated the total volume of decomposed granite on the three claims at 1,061,000 tons. The material constitutes what is called decomposed granite, even though it is not in fact the decomposition of granite as it contains altered feldspar, mica, and clay, which makes it different both physically and chemically from ordinary varieties of sand. These properties give it an advantage over common varieties of aggregates for sub-grade use in making roads and pathways because it gives a good degree of compaction when mixed with ordinary varieties of sand. Mr. Davis' opinion was that the deposits of decomposed granite were workable at a profit, and that a profit of ten cents a yard over and above the cost of developing and removing it would be of interest to a small operator. He made no estimate of the production and sales cost for the material. He found a large deposit of limestone on one of the claims, which could be economically profitable to remove and sell, as the same kind of limestone is being mined and sold at a profit just off the contestees' land, which operation is producing and selling at a profit 300 tons a day, according to the owner-operator. There is also a deposit immediately to the west of the contestees' property, which has been worked. He estimated that about 500 yards of material had been removed from the subject claims.

On cross-examination Mr. Davis stated that the physical appearance of the material on the Robinette claims appears to be the same as on the Vincent

claim, as well as the material on certain areas lying outside of the boundaries of any of these claims, the areas being colored in yellow on the contestees' Exhibit D. The Vincent Rock Quarry claim is accessible by a road which crosses the Robinette claims, the latter being more accessible to the highway than the Vincent claim. He estimated less than 100 cubic yards of material had been removed from two pits on the Vincent claim. On the Tootie and Martha and the Carol and Johnny claims there is a pit where they have made asphaltic road mix utilizing approximately 300 to 500 yards of material. Some years the consumption of decomposed granite in the Wrightwood area may be 300 yards and some years 1,000 yards. He suggested that the claimants expand their market for the material to other communities beyond the Wrightwood area, in other words, a projected expanded future market. The material has been used for sub-grade for roadways and walkways, and it can be added to sandy soils to retain water for lawns. Decomposed granite is of wide occurrence throughout the State, but the location of the subject claims at the point of use gives them an economic advantage. Mr. Robinette supplies the Wrightwood market from his property. As far as Mr. Davis knew there has not been any limestone mined from the contestees' claims.

John D. Merrill, a consulting engineer geologist, testified that he examined the subject claims to determine what minerals were on them. There is exposed on the claims decomposed granite and banded gneiss of variable physical characteristics. The material has specific characteristics, making it superior to other deposits in the neighborhood as it would readily blend with other materials for use in highly cohesive, relatively non-erodible backfill, and it could be used as a sub-base material for concrete or other construction purposes. It may be used as a road mix. He found a large outcrop of coarsely crystalline limestone on the Tootie and Martha claim, which extends into the Carol and Johnny claim. The limestone contains minor amounts of biotite mica and magnetite and it is interstratified with metamorphic rocks, but for the most part it is white, coarsely crystalline calcium carbonate. It is comparable to material being sold from property to the northwest of the claims, where 300 tons per day are produced and used for architectural purposes and for roofing granules.

On cross-examination Mr. Merrill stated that decomposed granite is a material of very extensive occurrence, but that limestone suitable for the uses found for limestone in Wrightwood is not so well distributed. He did not believe that limestone has been removed from the subject claims in significant quantities. He stated that about seven truck loads of decomposed granite were hauled from a pit in section 15 by Mr. Robinette, and that there are other pits on the claims but he did not know whether any material was removed from them. Limestone is used in Wrightwood as an architectural stone for walk ways, landscape architecture and for roofing granules. He admitted that any sales made from these claims would have to be competitive and, unless the existing market were expanded, it would have to serve all of the producing claims. He observed architectural stone on the claims suitable for construction of walls and fireplaces, but had no knowledge of any of the stone being removed.

Evelyn T. Harding, one of the claimants, testified that Mr. Robinette had removed and sold 105 cubic yards of material from the claims. Approximately 50 yards of this were removed in 1964 from the Carol and Johnny claim. The other 55 yards were removed in 1966 but she did not inquire as to what claim this material came from. These 105 yards, valued at $1 a yard, were given to Mr. Robinette in return for doing some assessment work. Mr. Robinette sold the material for $1.50 per yard. On cross-examination, Mrs. Harding said that she had a receipt for $65 for the sale of material which has not as yet been delivered. These constitute the sales.

John K. Andrich, Jr., one of the contestees, testified that he and his brother-in-law made the original discoveries on the claims, which were for ornamental rock and decomposed granite on the Vincent claim and decomposed granite on the other claims, and that there are several outcrops on the other claims that could be ornamental and structural building stone as well as some flat rock. The two sales of material testified to by Mrs. Harding were the sum total that have been made. He has removed 2 or 3 yards of flat rock from the claims over a period of time but has not sold any of it.

Amos D. Robinette testified that he took 105 cubic yards of material from the subject claims and credited Mrs. Harding with $105 towards assessment work. In addition she has paid him a total of $1,255 for assessment work. The 105 yards represents the sum total of all the decomposed granite which he has removed from Mrs. Harding's claims, and he has not removed any other materials such as building rock from the claims. Insofar as he knew there have been no other removals of materials from the claims except what he took.

A discovery of a valuable mineral deposit is a necessary requisite to a valid mining claim under the United States mining laws, 30 U.S.C. § 22, 35 (1964). A valid discovery is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in developing a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905). The act of July 23, 1955, 30 U.S.C. § 601 et seq. (1964), amended the mining laws by removing common varieties of mineral materials, including sand, stone and gravel, from the category of valuable mineral deposits subject to location under the mining laws. Common varieties are defined in the Departmental regulation, 43 CFR 3511.1(b), in pertinent part, as follows:

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. * * *

The Hearing Examiner said that materials of widespread occurrence, which can be produced advantageously but which are used only for the same purposes as other deposits of the same materials, are common varieties and are not locatable under the mining laws since July 23, 1955, since these advantages do not give them a special, distinct value, citing United States v. J. R. Henderson, 68 I.D. 26, 29-30 (1961); United States v. J. R. Cardwell and Frances H. Smart, A-29819 (March 11, 1964); United States v. R. R. Hensler, Sr. et al., A-20973 (May 14, 1964); and he held:

> The subject deposits of decomposed granite, limestone, and building stone exposed on the claims are of widespread occurrence and comprise the country rock of the area. While the deposits may be suitable for road mix, backfill, roofing granules, for the construction of walls and fireplaces, and for other uses, it has not been shown that they possess a distinct special economic value for such uses over and above the normal uses of the general run of such deposits. There is no evidence in the record that the said deposits have any distinct and special properties which would render them commercially valuable for use in a manufacturing, industrial, or processing operation.

and he thus concluded that the subject deposits are of a common variety, within the meaning of the act of July 23, 1955, supra, not subject to location under the mining laws since that date.

He further stated that where claims were located before July 23, 1955, for deposits of common varieties of minerals of widespread occurrence, such deposits, in order to constitute valuable mineral deposits, must, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, be shown to have been of such value that they could be mined, removed and disposed of at a profit on or before the date of the passage of the Act, citing United States v. P. D. Proctor et al., A-27899 (May 4, 1959); United States v. Quenton L. Brewer et al., A-27908 (December 23, 1959); Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (December 29, 1959); and United States v. E. J. Fife and Eugene Fife, A-28386 (September 19, 1960); and he concluded that:

> There is no evidence in the record of any sale of, or demand for, the subject deposits, or that the same could have been mined, removed and disposed of at a profit, before July 23, 1955. The materials removed by Mr. Robinette were credited for assessment work. This transaction does not constitute a bona fide sale. It is concluded that the subject deposits were not marketable prior to July 23, 1955.

The principles of law, findings and conclusions set forth by the Examiner are correct. In recent decisions the Department has discussed at length

the test for determining whether a mineral material is of a common or of an uncommon variety. The determination of whether a material is of an uncommon variety may be made (1) by ascertaining whether the deposit has some property making it useful for some purpose for which other commonly available materials cannot be used which gives it distinct and special value, or (2) if used for the same purposes as minerals of common occurrence, by determining if it has some property which gives it a special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other materials. See United States v. U. S. Minerals Development Corp., 75 I.D. 126 (1968); United States v. Gene DeZan et al., A-30515 (July 1, 1968); and United States v. R. W. Brubaker et al., A-30636 (July 24, 1968). The weight of the probative evidence definitely shows that the materials are used for the same purposes as other common materials in the area, and that the material does not command a higher price, let alone a significantly higher price, than the other similar materials of common occurrence.

In addition to the fact that it has not been shown that the materials on the subject claims were marketable at a profit on or prior to July 1, 1955, it was not shown that the materials were marketable at a profit at the time of the hearing in 1966, almost eleven years later. The total consumption of decomposed granite in the Wrightwood area ranges from 300 yards to 1,000 yards a year, which is being supplied by Mr. Robinette from his property. The Forest Service sells decomposed granite for 5 to 10 cents a yard in place, and one of the contestees' expert witnesses stated that a profit of 10 cents a yard over and above the cost of developing it and removing it would be of interest to a small operator. Even if the claimants were to capture the entire Wrightwood market, the total demand for which varies from 300 to 1,000 yards a year, it could hardly be considered a profitable venture. At a profit of 10 cents per yard, the maximum profit would be approximately $100 a year. One of the contestees' expert witnesses testified that he had suggested that his clients expand their market to other communities beyond the Wrightwood area. This would suggest a prospective market, and such a prospective market, in the sense of a market which might be developed at some unforeseeable time in the future, is insufficient to prove marketability. United States v. Ernest Higbee et al., Nevada Contest 3312 (September 25, 1968). The claimants have made no attempt to develop the limestone deposit or to market the material, nor have they done anything with the building stone except the one $65 sale of the material which had not been delivered at the time of the hearing. The market for these materials is apparently being adequately supplied from other nearby sources. The evidence indicates a lack of bona fides in development of the claims, which is one of the elements to be considered in determining whether there is a valid discovery on claims located for commonplace materials. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

In their appeal brief, the appellants made an extensive review and summary of the testimony and documentary evidence offered at the hearing, contending that it was established that a discovery of valuable nonmetallic minerals was made upon each of the claims prior to the effective date of the 1955 statute. We do not agree with this conclusion, for the reasons outlined hereinabove. The record assembled at the hearing supports the Examiner's

ruling that the contestees have failed to prove a discovery of valuable minerals on the claims prior to July 23, 1955, by a preponderance of the evidence. See Foster v. Seaton, supra, for the burden of proof that must be borne by the contestees.

The appellants contend, in substance, that the Hearing Examiner relied too heavily on their failure to remove and sell materials from the claims, and that this is not the criterion for determining whether a discovery has been made. It is true, of course, that sales are not the only criterion, but the paucity of sales over some 10 or 11 years from the time the claims were located in 1954 and 1955 until the hearing in 1966 raises a strong presumption that the material was not marketable at a profit, and is also indicative of a lack of bona fides in development of the claims by the claimants. The claimants' development work on the claims was shown to be only assessment work and the excavation of some prospecting pits.

The appellants have requested that judicial notice be taken of the testimony and certain exhibits in the Robinette case, Riverside Contest No. 05605, also before this office on appeal, and have requested that a Field Commissioner be appointed under the provisions of 43 CFR § 1843.5 to take testimony on these particular matters in the event that judicial notice cannot be taken of that case. If a further hearing were necessary in this contest case, it would not be authorized under 43 CFR § 1843.5, but the case would be remanded to the Office of Hearing Examiners to hold a further hearing under the Hearings Procedures, 43 CFR Part 1850. We have made a thorough review of the evidence adduced in the Robinette case in rendering a decision in that case, under date of February 17, 1969, and we found nothing therein which would benefit the appellants in this case. A further hearing does not appear to be warranted in the instant case. The appellants have also requested an oral argument before final submission of this case. As no useful purpose would be served by oral argument in this case, the request for oral argument is hereby denied.

The Hearing Examiner's decision of July 17, 1968, is hereby affirmed.

Evelyn T. Harding, John K. Andrich, Martha A. Andrich, Chester B. Turner and Winifred A. Turner are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all three claims adversely affected by this decision, the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is filed, the adverse party to be served is:

Mr. Charles F. Lawrence
Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION

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Mr. Charles F. Lawrence
Mrs. Evelyn T. Harding
Mr. John K. Andrich
Mrs. Martha A. Andrich
Mr. Chester B. Turner
Mrs. Winifred A. Turner
Office of Hearing Examiners, Sacramento
Regional Forester, Forest Service, USDA, San Francisco, California
Office of the General Counsel, USDA, Washington, D.C.
Forest Service, Division of Watershed Management, USDA, Washington, D.C. (12)
300 (4)
200 (2)
Appeals List No. 1
Gower Federal Service

appeal to Sec A-31151
Dismissed 8-19-69

Appeals Procedure: Dismissal 1840.0-7

An appeal to the Director, Bureau of Land Management, will be dismissed summarily when the appellant fails to serve a copy of his notice of appeal on the adverse party named in the decision appealed from in accordance with the regulations pertaining to appeals procedures.

United States v. Harold J. Geddis, Contest No. Sacramento 079616 (March 18, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 APR 14 AM 10 00

In reply refer to:
142
Contest No.
Sacramento 079616

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 18, 1969

DECISION

United States of America,
Contestant

v.

Harold J. Geddis,
Contestee

Involving the Little Johnny Ronda and Budlee lode mining claims, located in M.S. 6695, Secs. 26 and 27, T. 25 N., R. 7 E., M.D.M., Plumas County, California (within the Plumas National Forest).

Appeal Dismissed

Mr. Harold J. Geddis has appealed from a Hearing Examiner's decision, dated August 16, 1968, which declared the above-named lode mining claims null and void for the lack of a discovery of a valuable mineral deposit on either claim and which rejected his mineral patent application Sacramento 079616 for the said claims.

The Examiner's decision named as the adverse party, who must be served in the event of an appeal, the contestant's counsel, the Regional Attorney, U. S. Department of Agriculture, 630 Sansome Street, San Francisco, California 94111.

The appellant's notice of appeal was timely filed on September 9, 1968, but he has not furnished proof of service of his notice of appeal on the adverse party named above within 15 days after the date of filing of the document, as required by 43 CFR 1842.5-2. In response to a request from this office that he furnish the required proof of service, the appellant's attorney tendered a machine copy of a page from his office daily diary, indicating that a copy of the notice of appeal was mailed to the adverse party on September 12, 1968, as well as an affidavit by his secretary to the effect that the entries in the diary are in her own handwriting, and are, of her own knowledge, a true entry of the facts shown therein. After receipt of the reply from the appellant's attorney, this office then directed an inquiry to the Regional Attorney in San Francisco and was informed by his reply of March 4, 1968, that his office has received no copy of an appeal or reasons for appeal from Mr. Geddis or his counsel.

Since the adverse party did not receive the notice of appeal, the appeal must be dismissed summarily in accordance with the regulations in 43 CFR 1842.5-2 and 1840.0-7.

Mr. Harold J. Geddis is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:
Mr. George G. Holden, Attorney at Law (Certified Mail)
Regional Attorney, Office of the General Counsel, U.S. Dept. of Agriculture
Mr. Harold J. Geddis
Office of the Hearing Examiners, Sacramento, California
300 (6)
200
Gower Federal Service
Appeals List No. 1

appeal to Sec, A-31160

Appeals Procedure: Dismissal 1840.0-7

An appeal to the Director, Bureau of Land Management, must be dismissed where the appellant fails to point out any error in the decision appealed from.

Hearings Procedures: Government Contests - Answers 1852.1-6, 1852.1-7(a)

Where a contest complaint issued against a mining claim includes a charge that a valid discovery has not been made and where the contestee's response, made during the time for filing an answer, is to the effect that a discovery has not been made on the claim, it is proper to find that the charge is admitted and to declare the claim null and void.

United States v. Willie Walker, Contest No. OR 3508 (Oregon) (March 18, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 APR 14 AM 10 00

In reply refer to:
142
Contest No. OR 3508
(Oregon)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 18, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States,
Contestant

v.

Willie Walker,
Contestee

Big Spring No. 2 placer mining claim situated in Lot 3, sec. 27, T. 29 S., R. 7 W., W.M., Douglas County, Oregon.

Appeal Dismissed
Decision Affirmed

Mrs. Willie Walker has appealed from a decision of the Oregon land office, dated August 27, 1968, which declared the Big Spring No. 2 placer mining claim null and void, by reason of finding that the contestee's response to the allegation of the complaint does not constitute a denial of those charges.

The record shows that this proceeding was initiated by the issuance of a contest complaint by the Oregon land office on July 19, 1968, charging that (1) the land embraced within the claim is nonmineral in character, and (2) minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. The complaint stated that unless the contestee files an answer to the complaint within 30 days after service of the notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. It also stated that an answer should be filed in accordance with regulation 43 CFR 1852.1, a copy of which was attached.

A copy of the complaint was served on the contestee on July 22, 1968. On July 26, 1968, a letter from the contestee, which asked a number of questions, accompanied by a copy of the complaint, was received in the land office. The letter made no response to the allegations in the complaint. In a reply, dated July 31, the contestee was informed by the land office that the copy of the complaint was being returned and that the letter to the land office could not be considered an answer to the complaint, as contemplated by regulation 43 CFR 1852.1-6, a copy of which was enclosed. The letter explained, among other things, that an answer must be filed either admitting or denying the allegations set out in the complaint, that the answer must be filed no later than August 21, 1968, and that if an answer is not filed the case will be decided without a hearing.

On August 20, 1968, there was received in the land office the following written statement over the contestee's signature on the reverse side of the contestee's copy of the complaint:

> I am contesting this letter as I have not had the claim one year as of yet. But have done my assessements for last year and also this year of 1968. I have not been given a chance to go on to bedrock and I do believe I can find something there. Also I haven't been able as of yet to find out the why? (sic) that just my claim & one more is being taken. Others joining me have not been notified. Why just the two claims. I'm trying to find out.

The decision appealed from stated that the contest complaint charged that no valid discovery had been made and found that the response made by the claimant, quoted above, did not deny that charge. The decision held that the contestee's words "* * * I do believe I can find something there" are clearly an admission that a discovery has not been made.

Appellant's statement of reasons for appeal does not point out wherein the decision of the land office is in error. It is entirely devoted to other matters, including discovery, and relates that subsequent to the Government mineral examiner's visits to the claim black sand from the creek bed area has been concentrated and sent for analysis. On November 22, 1968, the contestee filed an unsigned copy of a report from the State of Oregon Department of Geology and Mineral Industries, dated October 29, 1968.

The Department has consistently held that the purpose of a statement of reasons is to inform the officer to whom the appeal is directed of the precise grounds upon which the reversal of the decision is sought and that its contents must be such that it indicates clearly the alleged error or errors in the decision appealed from. See Raphael R. Sutton, A-30248 (June 26, 1964), and cases cited. The penalty for failure to furnish reasons for an appeal is summary dismissal of the appeal. 43 CFR 1840.0-7.

Accordingly, the appeal is hereby dismissed.

Although the appeal is dismissed, we have, in view of the circumstances in the matter, reviewed the decision below and we conclude that the land office decision is correct.

The Department's regulations pertaining to contest proceedings state in 43 CFR 1852.1-6 that "Within 30 days after service of the complaint * * *, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, * * *", and in 43 CFR 1852.1-7(a) that "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing."

The requirements of the regulations are mandatory. The charges contained in the complaint in this proceeding, if admitted or proven, require a declaration that the mining claim is null and void.

A mining claimant is presumed to have the requisite knowledge of his claim to admit or deny the various allegations of a complaint against the claim. See United States v. M. V. Browning, Administrator, 68 I.D. 183 (1961). In the instant case, in considering the whole of the response to the contest complaint submitted by the contestee, it must be construed, as it was in the land office decision, as an admission by the contestee that a discovery had not been made on the mining claim. The decision below, therefore, correctly found from the statement of the contestee that the allegations of the complaint are taken as admitted, and it properly declared the claim null and void.

Accordingly, the decision appealed from is hereby affirmed.

Mrs. Walker is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mrs. Willie Walker (Certified Mail)
300 (6)
200
Gower Federal Service
Appeals List No. 1

Appeals Procedures: Dismissal 1840.0-7

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant did not serve a copy of his notice of appeal and his statement of reasons for appeal on the adverse party.

Hearings Procedures: Government Contests 1852.2

After notice and an opportunity to be heard, it is proper for a Hearing Examiner to proceed with a hearing, where the contestees chose not to appear at the hearing, and to base his decision on the uncontroverted evidence submitted against the mining claims.

United States v. Francis A. Lemos et al., Contest Nos. 5866, etc. (Sacramento) (April 2, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 APR 16 AM 10 00

In reply refer to:
142
Contest Nos.
5866, 5867 and 5868
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

April 2, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States, Contestant v. Francis A. Lemos, 1/ Magdelina Markwick, Individually, and as Administratrix of the Estate of Joseph A. Lemos, deceased, Josephine Noys, Wilhelmina Akers, Joseph A. Lemos, Jr., and F. E. Markwick, Contestees	:	Rocky Gulch, Revived Noia and Santana, Poverty, McCoy Diggins, Orchade, and Martin No. 1 placer mining claims, situated in secs. 2, 3, 10 and 11, T. 45 N., R. 7 W., M.D.M., Siskiyou County, California. Recorded in Book 73, page 126; Book 79, page 410; Book 70, page 105; Book 73, page 156; Book 72, page 28; Book 72, page 467, respectively, Mining Records of Siskiyou County, California

Appeal Dismissed
Decision Affirmed

Magdelina Markwick, Individually, and as Executrix of the Estate of Joseph A. Lemos, deceased, Josephine Noys, Wilhelmina Akers, Joseph A. Lemos, Jr., and F. E. Markwick 1/ have appealed from a decision of a Hearing Examiner, dated April 18, 1963, which declared the above-identified mining claims null and void for lack of a discovery of a valuable mineral deposit on any of them.

The appeal to the Director, Bureau of Land Management, of the above-named appellants is hereby dismissed summarily in compliance with the provisions of 43 CFR 1840.0-7, as they failed to serve the adverse party named in the decision appealed from, the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, with a copy of their notice of appeal or with a copy of their statement of reasons for the appeal within 15 days after filing each document as prescribed in 43 CFR 1842.5-2, in the manner set forth in 43 CFR 1840.0-6(e). The dismissal of an appeal for failure to comply with the cited regulatory requirements is mandatory. United States v. Oscar W. Weiss et al., A-30809 (September 14, 1967). The enclosed Circular 2137 contains the cited regulations.

1/ The Hearing Examiner was informed prior to the date of the hearing, by the attorney who had filed an answer to the complaint in Contest No. 5866 (Rocky Gulch Claim) on behalf of the contestees named therein, that Francis A. Lemos had died and that he is no longer represented.

Although the appeal is dismissed, for the reason given above, we have nevertheless reviewed the case record and we conclude that the Hearing Examiner's decision is correct.

The amended contest complaints issued by the Sacramento land office initiating these proceedings charged that (1) the lands embraced within the limits of the claims are nonmineral in character, and (2) the existence of a deposit of valuable mineral of sufficient quantity (and quality in Contest No. 5867) to constitute a valid discovery is not disclosed within the boundaries of the mining claims.

The record shows that the attorney for the appellants notified the Office of Hearing Examiners by telegram, and confirmation letter, prior to the hearing in Redding, California, on March 12, 1963, that they would not appear nor would they be represented at the hearing.

All of the claims, except the Martin No. 1, which is along Long Gulch, lie in an area drained by Rocky Gulch. The pertinent evidence was to the effect that the gravels found on the subject claims were ill-sorted, angular, or sub-rounded and contained in a high percentage clay having a maximum depth of 20 feet, and that mining operations exposed slate and schist bedrock. Gold is associated with these gravels but not in sufficient concentration to warrant mining. The sampling carried out at various places on the claims indicates that the overburden is barren and what values exist are on bedrock. All placer materials except a few scattered remnants, which could only be mined if the gravel was hauled to some source of water, have been mined. Except for the McCoy Diggins and Orchade claims, considerable placer mining was done on the claims years ago.

The Hearing Examiner found that the evidence presented by the contestant supports the charges in the contest complaints, and he declared all the contested claims invalid. We have carefully reviewed the record and agree that the Government established a prima facie case of no discovery, which has not been refuted by the contestees.

The Department has held that it is proper for a Hearing Examiner to proceed with a hearing, where the contestees choose not to appear, and to base his decision on the uncontroverted evidence submitted against the mining claims. United States v. Ernest Higbee et al., A-30348 (August 26, 1965). See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1958).

The appellants do not take issue with the facts in the case nor the application of the law. Appellants assert in essence that the investigative, prosecutive and judicial functions were exercised by employees of the same Bureau resulting in the lack of due process, denial of equal protection of the laws, and the taking of property without just compensation, all in violation of the Constitution. They also assert that the procedure is a violation of mining rights under existing laws. It is further contended that it was unfair to hold a hearing when the price of gold is "pegged" by the United States, while the cost

of labor has increased. They state in their statement of reasons for appeal that the Hearing Examiner refused to hold a hearing in the area where the claims are situated.

It is well established that the procedure followed by the Department of the Interior in the initiation, prosecution, and deciding of contests is in compliance with the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, now 5 U.S.C. § 551 et seq. (Supp. III, 1965-67). See United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967), and cases cited therein. The Hearing Examiners are appointed in accordance with the requirements made by the United States Civil Service Commission and the Administrative Procedure Act, supra. The legislative history of that act clearly shows that, although Congress intended internal separation within the Department of the investigation and prosecution from the adjudicative functions, it did not intend the establishment of a separate tribunal for conducting hearings and adjudicating matters in dispute. 2/

The Hearing Examiner in the instant case, who conducted the hearing and issued the decision from which the appellants have appealed, has been certified as qualified and competent by the United States Civil Service Commission in accordance with the Administrative Procedure Act. He has not participated in any way in the investigation and prosecution of the case. Moreover, the procedure followed by the Department of the Interior does not permit any person engaged in the investigation and prosecution of a contest in any case to participate or advise in the initial decision or agency review. This procedure is in accord with the act. William D. Cornia et al., Wyoming 4-63-6, etc., approved by the Assistant Secretary of the Interior on August 25, 1965.

Appellants' allegation that the proceedings are contrary to the United States Constitution is completely without merit. They have had an opportunity to be heard at a hearing before an impartial examiner to present witnesses and other evidence in their own behalf and to cross-examine those offered against them. This traditional method of determining the validity of mining claims was approved by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1964). Nevertheless, the contestees chose to remain away from the hearing.

Appellants' argument that it is unfair to invalidate mining claims where changed economic conditions are the result of the Government's control of the gold market, is without merit. The Department in United States v. Irving Rand and John M. Balliet, A-30036 (October 19, 1964) pointed out that:

> In Laycock v. Kenny, 270 F. 2d 580 (9th Cir. 1958), cert. denied, 361 U.S. 933 (1960), the court held that the Government has the constitutional power to control the purchase and sale of gold and that the Gold Reserve Act of 1934, 48 Stat. 337, 31 U.S.C. § 440 et seq. (1958),

---

2/ Rep. Atty Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong. 1st Sess. 55 (1941).

> is a valid exercise of the power even though mining claims might thereby be rendered valueless. At page 592 the court held that the Fifth Amendment, which forbids the taking of property without just compensation or the deprivation of it without due process of law, refers only to direct appropriation and "has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals."

The record shows that originally a hearing was scheduled to be held at the Siskiyou County Court House, Yreka, California, and that it was postponed at the request of the appellants and rescheduled for a later date in Redding, California. At the further request of the appellants, which contained no objection to the place of hearing, the hearing was again postponed to March 12, 1963, in Redding. Neither the telegram nor the letter with regard to nonappearance contained any objection to the place of hearing. The first documentation of an objection to the place of hearing is in appellants' statement of reasons for their appeal. Under the general mining laws there is no statutory provision with regard to the place where a hearing is to be held. Usually hearings concerned with the general mining laws are held in the county in which the lands involved are situated or at another point which will not cause undue difficulty in securing witnesses nor unduly increase the cost to the private parties. Nonetheless, an objection made to the place of hearing for the first time in writing in a statement of reasons for the appeal from a Hearing Examiner's decision is not timely made.

Since the named appellants were properly served with notice of hearing, their interests in the contested mining claims were subject to invalidation.

Accordingly, the decision appealed from is affirmed so far as the interests of the named appellants are concerned.

Magdelina Markwick, Josephine Noys, Wilhelmina Akers, Joseph A. Lemos, Jr., and F. E. Markwick have the right to appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. It the appeal covers all the mining claims adversely affected by this decision, the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

In the event an appeal is taken, the adverse party is to be served through the:

Regional **Solicitor**
U. S. Department of the Interior
Room E 2753
2800 Cottage Way
Sacramento, California 95825

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

DISTRIBUTION

Mr. Fred W. Burton, Attorney for Appellants (Certified Mail)
Regional Solicitor, U. S. Department of the Interior, Sacramento
Mrs. Magdelina Markwick, Individually and as Administratrix of the
  Estate of Joseph A. Lemos, deceased
Mrs. Josephine Noys
Mrs. Wilhelmina Akers
Mr. Joseph A. Lemos, Jr.
Mr. F. E. Markwick
Hon. Harold T. Johnson, House of Representatives (2)
Office of Hearing Examiners, Sacramento
200
300 (6)
Gower Federal Service
Appeals List No. 1

Mining Claims: Discovery 3413

To constitute a valid discovery upon a lode mining claim there must be a discovery within the limits of the claim of a lode or vein bearing mineral of such quality and quantity as would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; showings of low grade values in tungsten without evidence of any quantity of such materials are insufficient to establish a discovery.

United States v. Walter H. Goodwin et al., Contest No. S-1255 (Sacramento) (April 11, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 APR 25 AM 10 00

In reply refer to:
142
Contest No. S-1255
(Sacramento)

April 11, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

DECISION

United States,
Contestant

v.

Walter H. Goodwin and Mabel F. Goodwin,
Contestees

We Hope, a/k/a Wehope, lode mining claim situated in E½SW¼ sec. 22, T. 10 S., R. 26 E., M.D.M., Fresno County, California.

Decision Affirmed

Walter H. and Mabel F. Goodwin have appealed from a decision dated July 23, 1968, by a Hearing Examiner, which declared the above-named mining claim null and void for lack of a discovery of a valuable mineral deposit.

A contest complaint was issued by the Sacramento land office at the request of the Forest Service, U.S. Department of Agriculture, initiating this proceeding, which charged that there is not disclosed within the boundaries of the mining claim mineral materials of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery. A hearing was had on May 16, 1968, at which the contestant was represented by counsel and Mr. Goodwin appeared in his own behalf and was assisted by Mr. Robert E. Craig, a mining geologist.

The claim was located on July 28, 1939, and was purchased by the Goodwins on August 8, 1964. It is situated in the Sierra National Forest east of Madera, California. The mineral most frequently referred to is tungsten.

Mr. Wesley G. Moulton, a mining engineer employed by the Forest Service, testified that he examined the claim on three occasions. His first visit was on May 31, 1966, with Mr. and Mrs. Goodwin and an attorney. He observed that the workings consisted of a bulldozer cut about 75 feet long and 8 feet deep, a small 4 feet by 5 feet shaft approximately 15 feet deep, and a hand dug cut or pit about 25 feet long, 4 to 5 feet wide, and 3½ to 4 feet deep. In the pit he found tactite, a metamorphosed member that occurs along a contact between sedimentary rock and granite. He took two samples from the bottom of the pit, one in the center and the other at the north end of the pit.(Tr. 9 and 16). The assay report for these samples shows 0.16% and 0.11%

tungsten and only a trace of gold in each. (Exh. 13). He explained that 0.16% tungsten is 3.2 pounds of tungsten oxide per ton of rock, that the present price of tungsten is $43 per unit of 20 pounds or a little over $2.00 per pound of tungsten after it is concentrated and delivered to the buyer, that at 0.16% if one could get 100% recovery it would be worth $6.00, and that on that basis it would take 200 tons of such material to make one ton that would run 65%. He added that "But with 100% recovery it is almost impossible to call this material as ore" and it would be too expensive to concentrate an amount to become usable. (Tr. 18). Other improvements on the claim are a cabin, a small outhouse with a power unit, and a dam across a small stream. Mr. Goodwin told him that he was going to mine tungsten. This was the only mineral mentioned to him. (Tr. 10).

At the time of his first visit to the claim, before any assay results, Mr. Moulton from his observation thought that the quantity was so small that he suggested that Mr. Goodwin put in another cut to the south of the pit to determine the quantity of the material. On his second visit to the claims on August 15, 1967, in the company of Mr. Goodwin, Mr. Craig, Paul Muskie, a Forest Ranger, and Wendell Sharp, an Assistant Forest Ranger, he found that the new cut showed nothing, no tactite formation; it had stopped. This to him showed that on the claim there is a very small remnant of sediment and there is not any quantity. "It is 35 feet long and that is about it." (Tr. 19). The contact stopped before it got to the more recent cut. He then took four chip samples from the open pit, which had been deepened at least two feet since last year. (Tr. 20-21). A sample was taken at the south end of the pit near the surface. Another sample was removed from the center of the cut. The third sample was from the east side and bottom near the center of the cut. The fourth was from the north end of the cut about half way down. (Tr. 29). As far as the material in the cut was concerned it was similar to what he saw on his first visit. The only difference was that the cut was about two feet deeper and was 35 feet long, having been lengthened to the north. The samples were assayed for gold, silver and tungsten. (Exh. 14). The best of the four samples showed 0.050 ounces of gold per ton, valued at $1.75; 0.09 ounces of silver per ton, valued at 18 cents; and 0.79% tungsten oxide, which is 16 pounds per ton. The other samples assayed a trace, 0.02% and 0.23% for tungsten. Mr. Moulton was of the opinion that the sampling showed that the mineralization in the open pit was spotty, that it would require extreme care in trying to mine it, and that there is not sufficient quantity to make a mine. He mentioned that Mr. Goodwin, with the aid of mineral light, picks out the material which shows some fluorescence and puts it to one side and the rest of the material is moved to the other side. The material that shows fluorescence is shown in upper left hand side of a photograph, the right hand side shows scheelite material unsorted. (Exh. 8). He estimated the quantity of sorted material to be 3 to 4 tons, which he believed was a small amount, when you consider the size of the pit.

Upon his return to the claim on September 21, 1967, Moulton found that the pit had been further deepened, and he took three additional samples for

assay for gold, silver and tungsten. The samples contained no tungsten. Silver values ran from 34 to 46 cents a ton, and each only showed a trace of gold. (Exh. 15). To Mr. Moulton, the assay results indicated that what values there were are no longer there, but were mined out. (Tr. 25). He noted that sometime in the past Laurel Creek which runs through the claim had been placered.

Mr. Moulton stated that he had read Special Report No. 35, State of California, Division of Mines, on the Tungsten Deposits of Madera, Fresno and Tulare Counties, dated October 1953, which mentions the Wehope claims on Page 10 and contains on the map on page 11 a symbol near the claim number which indicates a tungsten occurrence from which no production was had before 1946. (Exh. 16). It was Mr. Moulton's opinion that a prudent man would not spend his money on the claim in hopes of developing a paying mine. He explained that the evidence on the ground shows that from the quantity standpoint there is not very much there. (Tr. 27).

On cross-examination Moulton pointed out that the assays show there is no value in the bottom of the pit at the present time and that the pit where Mr. Goodwin is working has changed from tactite to granite. (Tr. 29). He stated that what was lacking was quantity and as to quality the four samples that were taken are more representative of the pit as whole. (Tr. 44-45). He added that the appearance of granite indicates that it is the termination of the deposit.

Mr. Goodwin, a mechanical engineer with Douglas Aircraft, testified that when he purchased the claim in 1964, the claim had a bulldozer cut, a shallower center cut and the discovery shaft. He identified Exhibit A as a photograph of the main pit as of September 1967, from which in the spring of 1968 he had removed some overburden to ascertain whether the tactite extended northward. No assays were made of that exposure. (Tr. 32). His mineral light examination indicates that tactite extends to the end of the pit and its present depth is 4 feet. It only showed traces of tungsten but, he added, this is typical of the whole claim on the surface. He acknowledged that he was present when the samples listed in Exhibits 13 and 14 were taken. The pit is now about 4 feet deeper than when those samples were taken. He was not present when the samples listed in Exhibit 15 were removed. He identified Exhibits C and D as assay reports of concentrates of material obtained from previously mentioned piles of assorted ore. They show 57.00% and 56.27% tungsten, respectively. He stated that no special effort was made to pick out the selected ore and that he milled pilot runs. The milled material was taken to Sierra Madre where it was put across a table. Exhibits F and G are specimens of the concentrates. He stated that he purchased the pilot mill in 1965, and that the material that was concentrated came from the center of the pit. He had no idea of the amount of material taken from the ground for concentration. (Tr. 52).

On cross-examination Mr. Goodwin stated that in the fall of 1964 he went deeper with the bulldozer and opened up this strike, not the original strike, and that the original discovery pit is on the opposite side of the granite that Mr. Moulton said it cuts off. In 1965 he seriously began digging in this area and the farther he went the better it became. (Tr. 50-51).

Exhibit H is a letter, dated August 20, 1965, addressed to Mr. Goodwin by the California Division of Mines and Geology, to which Mr. Goodwin submitted a rock specimen. It states, "Although the quantity of tungsten in your specimen appears to be of good grade, we cannot make any comment on potential value without field investigation of your deposit." Exhibit E relates to correspondence with Kennametal, Inc., Fallon, Nevada, and includes that company's tungsten ore buying schedule which provides that the base price is $40 per S.T.U. at 65% WO_3 and lists the grade bonus or penalty. It states that 55 to 60% WO_3 has a 20 cent penalty for each percentage point below 65%, that 50 to 55% WO_3 has a 30 cent penalty for each percentage point below 65%, and that 45 to 50% WO_3 has a 40 cent penalty for each percentage point below 65%.

Mr. Craig, on behalf of the contestees, expressly referred to Special Report 35 (Exh. 16) at page 79, concerning the We Hope claims, which states, "Scheelite in tactite 1.5 ft. thick, exposed only in trench and pit. Content of WO_3 0.3 to 0.5 percent. Prospected by trench and pits. No production." On behalf of the contestees, Mr. Craig's closing statement was that they felt that mineral in sufficient quantity has been exposed to date to prove mineral in place as required by the statutes.

The Hearing Examiner's decision properly stated that discovery is a prerequisite to the validity of a mining claim, and that discovery is the finding of a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). The "prudent man" standard has been approved by the courts for many years. Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1964); United States v. Coleman, 390 U.S. 599 (1968).

The decision below pointed out correctly that in order to have a discovery, mineral must exist in sufficient quantities to justify the expenditure of money for the development of a mine and the extraction of the mineral, and that the existence of such mineralization must be demonstrated, in the case of a lode claim, by the exposure within the limits of the claim of a vein or lode of mineral-bearing rock in place, possessing in and of itself, value for mining purposes, citing United States v. Adam J. Flurry, A-30877 (March 5, 1968), and cases mentioned therein.

The record supports the Hearing Examiner's finding that the Government's mineral examiner made three visits to the contested claim, where he observed a small deposit of tungsten-bearing ore exposed in a pit, and that the deposit was cut off by granite which was exposed in cuts made at right angles beyond each end of the pit, and that with increased depth at the time of final examination there were no values in tungsten remaining in the pit. We concur in the Hearing Examiner's ruling that this established a prima facie case that the quality and quantity of the deposit was insufficient to constitute a valid discovery. The Hearing Examiner pointed out that it then became incumbent upon the contestees to establish that there is a mineral deposit on the claim of sufficient value to constitute a discovery. In other words, the burden shifted to the mining claimants to establish by a preponderance of the evidence that their claim is valid. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1969). He correctly further found that the contestees failed to meet that burden as they merely established that they had selected several tons of material from the pit which could concentrated or milled to commercial grade, and they did not show that there was a sufficient quantity of such material within the limits of the claim to justify its development.

Appellants mainly allege several inadvertencies in the decision of the Hearing Examiner. First, as to the land office of origin of the contest complaint, admittedly the Sacramento land office issued the complaint which initiated these proceedings and not the Riverside district and land office, as stated erroneously by the Hearing Examiner. Second, the Government's mineral examiner made his initial visit to the claim on May 31, 1966, rather than May 31, 1968, as stated erroneously in the decision below.

It is maintained that the claim was located for gold and tungsten, and not, as stated in page 1 of the decision appealed from, for tungsten alone. The paragraph wherein the statement occurs is a general one, more in the nature a preface or introduction, the source of which is not ascribed to any particular witness or document. We have carefully reviewed the entire record made at the hearing, which is the sole basis for a decision, 43 CFR 1850.0-8(a)(3), and find the Government's witness stated that tungsten was the only mineral mentioned to him by Mr. Goodwin. (Tr. 10). No objection to this statement is noted in the hearing record. Nevertheless, the mineral examiner did have some samples assayed for gold and silver as well as tungsten (Tr. 22, 24, Exhs. 14 and 15). We note also that none of Mr. Goodwin's testimony relates to values other than for tungsten.

We agree with the appellants that the decision below erroneously states that contestees' concentrated sample, Exhibit C, assayed .47% tungsten. The assay report (Exh. C) shows that the concentrate assayed 57.00% tungsten. However, it is not a basis for reversal, for no matter which figure is used, it, like Exhibit D, has very little or no evidentiary

weight, because Mr. Goodwin did not know the amount of original material that was taken from the pit for concentration in order to obtain the samples whose values are indicated in those exhibits. United States v. Northern Pacific Railway Co., 1 F. 2d 53, 57 (D. Mont. 1924).

Referring to the decision below wherein the two samples by Moulton on his first visit to the claim are stated to have been taken "from the bottom of the pit," appellants assert that there is no record in the hearing transcript that these samples were taken at that point. This assertion lacks merit. The transcript at page 9 reads, in pertinent part: /Mr. Moulton testifying/

> A First I visited the claim on May 31, 1966 with Mr. and Mrs. Goodwin and later on an attorney by the name of Shepard came.
>
> At this time, I took two samples in the bottom of this pit. The pit was approximately 25 feet long and about 4 feet wide at the top, and 4 to 5 feet wide at the bottom. /Emphasis added./

Page 16 of the transcript /an exchange between contestant's counsel and Mr. Moulton/ reads, in pertinent part:

> Q BY MR. LAWRENCE: Going back to 1966, what did your examination consist of?
>
> A I visited the open pit with Mr. Goodwin and we looked at it and, at this time, I told him that I thought he needed two things. I told him he needed quantity and he needed quality of material. And, at this time, he had about 25 feet of ground opened up, the width of it was about 4 to 5 feet and I think it was about 3-1/2 to 4 feet deep.
>
> At this time, I took two samples. I took one sample in the center of the cut and one at the north end of the pit. These samples (indicating). /Emphasis added./

Appellants suggest that the Hearing Examiner's statement in paragraph 3 on page 3 which reads, "there were no values in tungsten remaining in the pit," could be more properly phrased as "there were no values in tungsten in the samples taken without supervision on September 21, 1967, and sent to a laboratory not acceptable to the contestees." They admit that they or their representatives were present during the two earlier examinations. The Government's mineral examiner did not disclose whether or not he was accompanied on his third visit to the claim by the contestees or their representative or whether they were notified of his intention to again examine the claim. No objection was made at the hearing to the introduction of the assay report on the three samples he took from the pit on that occasion. Mr. Goodwin said that he was not present so he did not know where they were taken. The Department in United States v. Esther R. Smith,

A-30888 (March 29, 1968), when confronted with the charge that the Government's case was defective by reason of failure of the Government's examiner to notify the mining claimant in advance of his intention to examine the claim, pointed out that there are obvious advantages in a joint examination by the Government's examiner and the mining claimant in the obtaining of meaningful evidence and that the failure of a Government examiner to attempt a joint examination results in a weakening of the Government's case. The decision concluded that this defect in procedure was not fatal to the Government's case. In reaching this conclusion the Department explained the nature of the *prima facie* case which the Government is obliged to make in challenging the validity of a mining claim, emphasizing that the Government has neither the duty to show affirmatively that the land embraced in a mining claim is nonmineral in character or that no discovery of a valuable mineral deposit has been made, nor an obligation to make such exhaustive search of the lands and test of materials as would normally be conducted by a prospector, but that the Government examiner's function is one of verifying, if possible, the discovery claimed and that when a Government mineral examiner testifies that he has examined all of the exposed areas of the claim without finding evidence of a discovery, a *prima facie* case has been made which the mining claimant can rebut only by showing, by a preponderance of the evidence, that a valuable mineral deposit has been discovered. See *United States* v. *Thomas C. Wells*, A-30805 (January 8, 1968); *United States* v. *Frank Coston*, A-30835 (February 23, 1968).

The record made at the hearing contains no objections by the contestees concerning a certain laboratory to which a portion of the Government's samples were sent for assay. We note that the record shows that Mr. Goodwin was specifically asked by the Hearing Examiner whether he had any objection to each of the assay reports offered in evidence by the Government. His reply in each instance was negative. (Tr. 17, 21-22, 24-25). Since the first objection to the particular laboratory that performed those assays is in appellants' statement of reasons for their appeal from the Hearing Examiner's decision, it is not timely made.

The Government mineral examiner testified that he examined the claim and he observed that the workings exposed no evidence of a valuable mineral deposit. We conclude that this was adequate evidence to establish a *prima facie* case that the contested mining claim is not valid. The conclusion would be the same even if the samples obtained by Moulton during his last visit to the claim were to be disregarded. We agree with the decision below that the evidence presented by the contestees failed to overcome the Government's case and to establish the validity of the claim. Moreover, the Government's case could have been rebutted by the mineral claimants simply showing what the Government mineral examiner had missed, and showing a discovery of a valuable mineral deposit. *United States* v. *Frank Costen*, *supra*. This they failed to do.

The evidence supports the Hearing Examiner's conclusion that the mineral showings were insufficient under the prudent man test, long followed by this Department, to establish that there is a discovery of a valuable mineral deposit within the limits of the subject mining claim.

Accordingly, the decision appealed from is affirmed.

Mr. and Mrs. Goodwin have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party is to be served through the:

Regional Attorney
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Walter H. Goodwin and Mrs. Mabel F. Goodwin, Appellants (Certified Mail)
Regional Attorney, Office of the General Counsel, U.S. Dept. of Agric.
Regional Forester, Forest Service, U.S. Dept. of Agric.
Office of the General Counsel, Div. of Forestry and Land, U.S. Dept. of Agric.
Div. of Watershed Management, Forest Service, U.S. Dept. of Agric. (12)
200
300 (6)
Gower Federal Service
Appeals List No. 1

appeal to Sec. A-31172

Sodium Leases and Permits: Generally 3150

Rental for sodium leases is due and payable on or before the first day of each calendar year during the life of the lease. 30 U.S.C. § 262.

A relinquishment of a sodium lease may be accepted and the rental prorated on a monthly basis for the period of the calendar year which has elapsed where the relinquishment is filed after accrual but before payment of rental due, where failure to file the relinquishment before accrual of the rental is not due to lack of reasonable diligence on the part of the lessee.

Southwest Salt Company, LA 0158996, etc. **(May 23, 1969)**

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JUN 4 AM 10 00

In reply refer to:
142
LA 0158996
0159227

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 23, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Southwest Salt Company :
: Sodium

Decision Affirmed, as Modified

Southwest Salt Company has appealed from a decision of our Riverside district and land office dated January 24, 1969, which advised the lessee that sodium leases LA 0158996 and 0159227 were each in default for lease rental payments due January 1, 1969, the first day of the calendar year, on which date rental for sodium leases is due pursuant to section 24 of the Mineral Leasing Act, as amended, 30 U.S.C. § 262 (1964). The decision stated that rental due, computed at the rate of $1 per acre or fraction thereof for each lease, is $2,563 for lease LA 0158996 and $2,574 for lease LA 0159227.

The record shows that each of the subject leases was issued to Danby Salt Corporation as a preference right lease based on discovery of sodium under a prospecting permit. Lease LA 0158996 was issued effective November 1, 1964; lease LA 0159227 was issued effective February 1, 1963. Assignment of record title to each lease was approved to Southwest Salt Company effective January 1, 1969.

Although the leases were prepared on different editions of the same Bureau form (Form 4-1134), each provides it is issued pursuant and subject to the terms and provisions of the Act of February 25, 1920 (41 Stat. 437), as amended, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions of the leases. Lease LA 0159227 is on Form 4-1134 (Dec. 1958) and provides in Section 2(b) for payment of rental annually in advance for the first calendar year or fraction thereof at the rate of 25¢ per acre or fraction thereof, for the second, third, fourth, and fifth calendar years, respectively, at the rate of 50¢ per acre, and for the sixth and each succeeding year of the lease term at the rate of $1 per acre. Lease LA 0158996 is on Form 4-1134 (Mar. 1964) and provides in Section 2(c) for payment of rental annually in advance at the same respective rates of 25¢, 50¢, and $1, but does not refer to payment on a calendar year basis. 1/

1/ The current form for sodium leases, Form 3150-2 (Oct. 1966), provides for rental payment in advance on a calendar year basis.

The pertinent part of section 24 of the Mineral Leasing Act, as amended, supra, provides, and has provided since the amendment approved December 11, 1928 (45 Stat. 1019), that all sodium leases shall be conditioned upon payment in advance by the lessee of a rental of 25¢ per acre for the first calendar year or fraction thereof, 50¢ per acre for the second, third, fourth, and fifth calendar years, respectively, and $1 per acre per annum thereafter during the continuance of the lease.

Each lease file shows that the land office has been sending to the lessee an advance courtesy billing notice for each calendar year starting with January 1, 1964, for lease LA 0159227, and with January 1, 1965, for lease LA 0158996, and that the annual rental on a calendar year basis has been paid by the lessee on or before the first business day of January of each year to and including January 1968. No rental for calendar year 1969 has been paid for either lease. The billing notices for calendar year 1969 were sent to the then lessee of record, Danby Salt Corporation, in November 1968.

In its appeal, Southwest Salt alleges that it was advised by the Riverside district and land office decision dated January 2, 1969, that the assignments filed March 5, 1968, and completed September 30, 1968, conveying title to the sodium leases to Southwest Salt Company had been approved effective January 1, 1969, and that both lease accounts were in good standing on the date of the decision; 2/ that operations seeking to develop and exploit the sodium resources on lands adjacent to these leases had resulted in great financial loss to the company; that no utilization of the real property covered by these sodium leases had been made by Southwest Salt or by the original lessee, Danby Salt Corporation; that Southwest Salt, on December 31, 1968, had informed its counsel of a desire to allow lease LA 0159227 to "lapse," meaning that the counsel should prepare the necessary documents to effect a relinquishment of the lease prior to the anniversary date of February 1, 1969; that an employee of the Riverside district and land office, on January 16, 1969, in response to a telephone inquiry by the counsel first had declared that a relinquishment of lease LA 0159227 filed prior to February 1, 1969, would be timely and before any further rental would be due, and similarly a relinquishment of lease LA 0158996 filed before November 1, 1969, would likewise be timely; that later telephone conversations on the same date originating in the land office were to the effect that rental on both leases had been due and payable on or before January 1, 1969, computed on a calendar year basis according to statute, which overrode any lease terms to the contrary, and that the substance of the final phone conversation would be set forth in a decision. Essentially, the appellant contends that the statute, 30 U.S.C. § 262 (1964), does not require payment of annual rental for a calendar year

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2/ The record indicates that the decision approving the assignments was signed on December 31, 1968, but was not dated until January 2, 1969. On December 31, 1968, the rental accounts for both leases were in good standing.

to be made on or prior to January 1 of that year; that the relinquishment of lease LA 0159227 filed January 30, 1969, should be considered as timely for a lease issued February 1, with no rental liability for any part of calendar year 1969, and that payment of rental on a pro-rated basis should be allowed for the period of calendar year 1969 prior to the time the relinquishment was actually filed. The appellant further contends that it finds itself in the present predicament principally because of failure of the Riverside district and land office to act promptly on the assignments perfected September 30, 1968, and thereafter to communicate accurate information relative to the rental status of each lease.

It is unfortunate that the situation surrounding the assignments developed as it did, but we must point out that much of the delay before it was possible to approve the assignments to Southwest Salt Company was occasioned by failure of Southwest Salt to submit all the information required by the regulations relative to its qualifications to hold the sodium leases. The record indicates that the assignments were not in form for approval until November 22, 1968.

As to the charge that erroneous information or misinformation was given to the appellant's counsel, the point is firmly established that the Government is not bound by errors of its agents, and that no rights not sanctioned by law may be obtained against the Government as a result of reliance on erroneous information or advice furnished by an employee of a land office. Arnold H. Echola, A-30831 (November 16, 1967). See also Wayne E. Bright, A-30475 (February 4, 1966); Guenther-Pearson Prospecting Company, A-30243 (March 29, 1965); Husky Oil Company, A-30440 (October 27, 1965).

With respect to the contention that annual rental for the sodium leases is not due on or before January 1 of each calendar year, we look to the language of the statute which is clear and unambiguous in its requirement that rental for a sodium lease be paid in advance on a calendar year basis. 30 U.S.C. § 262 (1964). The land office was correct in its decision that rentals for calendar year 1969 are in default for each lease.

The request by the appellant that rentals due on lease LA 0159227 be prorated for the period of 1969 prior to the time of filing of the relinquishment is in accordance with the act of November 28, 1943, 30 U.S.C. § 188a (1964), which provides that where relinquishment of a lease is filed after accrual but before payment of rental, the rental may be prorated on a monthly basis when it is found that the lessee's failure to file a timely relinquishment prior to the accrual of rental was not due to lack of reasonable diligence. In this case, it appears that the present lessee did not show lack of reasonable diligence in filing the relinquishment of lease LA 0159227, and therefore is entitled to the benefits of the act of November 28, 1943, supra. Accordingly, the rental payment required

for sodium lease LA 0159227 for calendar year 1969 is computed to be one-twelfth of the annual rental of $2,574, or $214.50, inasmuch as the relinquishment was filed January 30, 1969.

As no relinquishment has been filed for lease LA 0158996, the lessee is presently obligated to pay rental for the calendar year 1969 in the amount of $2,563, as required by the land office decision.

The decision appealed from is affirmed, as modified herein.

Southwest Salt Company has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each lease included in the appeal. If the appeal covers both leases adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

DISTRIBUTION:
Gillin and Scott, Attorneys for Appellant (Certified Mail)
Southwest Salt Company
200
300 (6)
GS, Cons Div (6)
GS, Cons Div, Br of Mining (6)
Gower Federal Service
Appeals List No. 1

appeal to Sec
A-31184

Multiple Mineral Development: Act of July 23, 1955: Applicability 3511.1

Since the Surface Resources Act deals with the problem of subsurface uses competing for the same land with such surface uses as ingress-egress, water, soil, grass, parks, monuments, recreation areas, fish, wildlife and waterfowl, as well as timber, there is no merit to the mining claimant's argument that a proceeding under section 5 of the act should be dismissed unless the Government can show that there is timber of commercial value on the mining claim.

Hearings Procedures: Evidence 1851.5

Assay reports, without the assayer being present, have long been accepted as competent evidence by mining claimants, as well as by the Government, in proceedings before the Department.

46-66

United States of America v. A. P. Jones, Sacramento Contest No. 44-66
(June 9, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 JUN 26 AM 10 00

In reply refer to:
142
Sacramento Contest
No. (44-66) 46-66
(P.L. 167, 84th Cong.)
June 9, 1969

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America : Five Mile Quartz Claims Nos. 1 and 2
v. : located in sec. 5, T. 2 N., R. 15 E.,
A. P. Jones, : and sec. 32, T. 3 N., R. 15 E., M.D.M.,
Mining Claimant-Appellant : California, within the Stanislaus
: National Forest.

Decision Affirmed

Mr. A. P. Jones has appealed from the Hearing Examiner's decision dated June 14, 1968, which held that, prior to issuance of a patent, the above-identified mining claims are subject to the limitations and restrictions of section 4 of the Surface Resources Act, as amended, 30 U.S.C. § 612 (1964), for the reason that no evidence has been offered to show the present existence of valuable minerals on either claim.

Section 4 of the Surface Resources Act, supra, provides, inter alia, that rights to mining claims located after July 23, 1955, on public lands shall be subject, prior to the issuance of patent, to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location under the mining laws. Section 5 of the act, 30 U.S.C. § 613 (1964), sets out the procedure whereby mining claims located before July 23, 1955, may be subjected under certain circumstances to the provisions of section 4, and makes provisions for a hearing where there is a question as to the validity of asserted rights. In a proceeding under section 5 of the act, supra, to determine the right of a mineral claimant to the surface resources of his mining claim, the claim is properly subject to the terms and limitations of section 4 of that act unless it is shown that there is a present valid discovery within the meaning of the mining laws within the limits of the claim and there has been a valid discovery thereon **at all times prior to July 23, 1955.** United States v. Adam J. Flurry, A-30887 (March 5, 1968).

Upon the recommendation of the Forest Service, United States Department of Agriculture, this proceeding was initiated pursuant to section 4 of the Surface Resources Act, supra, to determine the right to the use and control of the surface of the land embraced within the subject mining claims. A hearing was held on May 1, 1968, on the charge that minerals have not been found within the limits of either claim of sufficient quantity, quality and value to constitute a valid discovery. At the hearing the Government was represented by the Office of the General Counsel, Department of Agriculture, and Mr. Jones appeared personally (Tr. 4, 69) and was represented by counsel. The evidence adduced at the hearing shows:

The claims were located long prior to the enactment of the Surface Resources Act of July 23, 1955, supra. The Five Mile Nos. 1 and 2 Quartz claims (which will hereafter be referred to as the No. 1 and No. 2 claims) overlap each other considerably, and the No. 1 claim overlaps the Five Mile No. 3 Quartz claim which is property not in issue. A mining engineer-geologist employed by the Forest Service examined the mining claims in the presence of Mr. Jones (Tr. 18), making a detailed examination of all workings (Tr. 18). Samples were taken by the mining engineer witness, and he sent them to an assayer to be tested for gold and silver. Since the assayer was not present at the hearing, the mining claimant objected to all evidence relating to the assay report (Exh. 11). The mining engineer testified as to where and the manner in which he took his samples, the manner in which he delivered the samples to the assayer and he in turn received the assay report, and he confirmed that the report was signed by the assayer (Tr. 24). The assay report was offered and received in evidence. The assay report shows that the samples taken from both claims tested insignificant values for silver and the highest value obtained from either claim only showed $1.75 per ton for gold. The witness is of the opinion that the minimum values which must be obtained from either claim in order to merely pay the expenses, but not earn a profit, would be $20 a ton for a minable width of approximately 30 inches (Tr. 41, 43-44). The expert witness testified that he found nothing exposed on either claim by his sampling, reconnaissance work, or the assay report, that indicates a discovery of a present valuable mineral deposit (Tr. 34). He stated that the slight mineral values exposed do not warrant development (Tr. 34).

The only witness for the mining claimant was Mr. Alfred A. Adams, who held the claims for approximately 40 years and then sold them and other property to the appellant for $3,000. Mr. Adams testified concerning gold values found on the No. 3 claim, which is not in issue. This witness stated that Mr. Jones would be justified in developing the Nos. 1 and 2 claims if the appellant did not hold the No. 3 claim which has so much greater values exposed (Tr. 54). But, when the witness' testimony relates only to the No. 1 and 2 claims, and not the No. 3 claim, he never offered a showing of present mineral values on such lands. He agreed that for all practical purposes he had only removed gold from the claim not in issue (Tr. 61). When asked if he knew of his own knowledge whether there was a deposit of gold discovered on the No. 2 claim, he merely replied that such a deposit had been found and removed during the late 1890's and early 1900's (Tr. 56-57). Mr. Adams testified that there had been two forest fires in the area, so, although the lands have been reseeded, there are not enough large trees remaining to have a commercial value (Tr. 64).

The Forest Service mineral examiner established a prima facie case that there was not a present discovery on either mining claim in issue by showing that, after an examination of the claims using approved procedures, he found no mineral deposit exposed which could be mined with a reasonable expectation of making a profit. The mining claimant was then required to assume the burden of proving a discovery by a preponderance of the evidence. He failed to establish a present discovery by testimony that a deposit once exposed on one of the claims had been mined out and that there was a mineral deposit on adjoining land. See United States v. Warren E. Wurts et al., A-30945 (January 23, 1969). The best that can be said for the claimant's

evidence is that he hopes to find mineral values some day on the Nos. 1 and 2 claims equivalent to that exposed on the adjoining property. The "nucleus of value" which sustains a discovery must be such that with actual mining operations, under proper management, a profitable venture may reasonably be expected to result, and where a mining claimant fails to make such a showing the claims are properly held subject to the restrictions of the Surface Resources Act. Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968).

At the hearing (Tr. 45) and in his appeal, the appellant asserts that there are no vegetative resources of value on either claim, and alleges that, for that reason, it is improper to hold the lands subject to the limitations and restrictions of section 4 of the Surface Resources Act, supra. The act in pertinent part provides:

> * * *
>
> (b) Rights under any mining claim * * * shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land * * * (emphasis added). 30 U.S.C. § 612(b) (1964).

Clearly, the surface resources and ingress-egress rights referred to in the act relate to more than just timber. That Congress intended the Surface Resources Act to relate to more than timber rights is borne out by H.R. Rep. No. 730, 84th Cong., 1st Sess,(1955), 2 U.S. Code Cong. & Ad. News, pp, 2474-2498 (1955). At pages 2475-2476 of this report it is noted that a problem had arisen to develop statutory authority and regulations to encourage mining activity on public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, fish, wildlife and waterfowl. The report states that the act is to deal with these problems of surface versus subsurface competing uses. Commercial timber is merely one part of the surface which is subject to management by the United States on mining claims coming within the purview of the act. The purpose of this proceeding is to determine whether the claimant can use the land embraced within the claims for purposes other than prospecting, mining and processing. See Converse v. Udall, 262 F. Supp. 583, 585 (D. Ore. 1966), aff'd supra (9th Cir. 1968). There is no merit to the appellant's argument that whether or not there is commercial timber on the land is an issue in this proceeding.

The appellant argues that the Hearing Examiner erred in admitting the assay report (Exh. 11) of the Forest Service mineral examiner's samples taken from the claims, since the assayer was not at the hearing. The finding in the

decision appealed from that there was no present discovery shown on either mining claim in issue was based upon the testimony of the Forest Service mining engineer concerning his examination of the claims, and the absence of a showing of an exposed mineral deposit of value by the claimant. The mining engineer testified that he examined the claims on two separate occasions, that the last examination was very detailed, that Mr. Jones accompanied him but did not point out any mineral deposits of value on the claims, that the mining engineer saw nothing on the claims that he considered likely to be mined at a profit, and that the assay reports supported his visual examination showing no deposits of value exposed on either claim. The admission of hearsay evidence is no basis for reversal of an administrative decision since technical exclusionary rules of evidence applied in court proceedings are not applicable in such administrative proceedings. Instead, whether such evidence is considered and what weight is given it may depend upon whether there is other corroborative evidence and whether it is in the interest of fair play and justice to allow the evidence. Assay reports, without the assayer being present, have long been accepted as competent evidence by mining claimants, as well as by the Government, in proceedings before the Department. Such evidence redounds to the advantage or disadvantage of each party equally. Where undue weight is not given to hearsay evidence, and where the exclusion of the hearsay evidence would not alter the result of the case, a hearing examiner may properly consider such evidence. United States v. Lawrence W. Stevens et al., A-30980 (March 24, 1969). In the absence of any evidence by Mr. Jones to show a deposit of value exposed on either claim to rebut the Government mineral examiner's testimony that he could find nothing to verify such a deposit, after a careful examination using approved procedures, we have no difficulty in determining that the assay report was properly admitted as corroborative evidence.

No present discovery of a mineral deposit of sufficient quantity and quality to be mined with a likely prospect of obtaining a profit was shown to presently be exposed on either mining claim in issue. Since there is no present valid discovery shown on either mining claim, they were properly held subject to the limitations and restrictions of section 4 of the Surface Resources Act, supra. Converse v. Udall, supra (9th Cir. 1968). Accordingly, the Hearing Examiner's decision is affirmed that the Five Mile Quartz Claims Nos. 1 and 2 are subject to the limitations and restrictions of section 4 of the act, prior to issuance of a patent.

It should be emphasized that the Hearing Examiner's decision does not preclude Mr. Jones from using the sites for mining purposes, subject to the limitations and restrictions specified in section 4 of the Surface Resources Act, but merely limits his use of such lands, prior to the issuance of patent, to such uses as prospecting, mining and processing. The United States has the right to manage the surface resources of such lands and to control the use of the lands within the purview of section 4 of that act.

Mr. Jones has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers both mining claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

If an appeal is taken by Mr. Jones, the attorney for the adverse party who must be served is:

Regional Attorney
Office of the General Counsel
United States Department of Agriculture
Room 860
630 Sansome Street
San Francisco, California 94111.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. David Holstrom, Attorney for the Appellant (Certified Mail)
Mr. A. P. Jones, Mother Lode Machinery Company
Regional Attorney, Office of the General Counsel, U.S. Dept. of Agriculture
Regional Forester, California Region, Forest Service, U.S. Dept. of Agriculture
Office of the General Counsel, Division of Lands and Forestry,
    U.S. Dept. of Agriculture (2)
Forest Service, Division of Watershed Management, U.S. Dept. of Agriculture (12)
300 (6)
200
Gower Federal Service
Appeals List No. 1

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1959 JUL 28 AM 10 00

Appeals Procedures: Summary Dismissal 1840.0-7

An appeal to the Director, Bureau of Land Management, will be dismissed when the appellant fails to file a statement of reasons for the appeal within the extended period of time allowed therefor.

Humboldt Placer Mining Company and Del de Rosier, Sacramento 049136 (August 18, 1969)

In reply refer to:
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Sacramento 049136

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

August 18, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Humboldt Placer Mining Company and Del de Rosier	:	Mineral Patent Application

Appeal Dismissed

The Humboldt Placer Mining Company and Del de Rosier have appealed from a decision of the Sacramento land office, dated September 23, 1965, which allowed them 30 days within which to cure specified defects in their above-numbered mineral patent application for certain placer mining claims situated in Ts. 34 N., Rs. 8 and 9 W., M.D.M., California, or to appeal to the Director, Bureau of Land Management.

On October 22, 1965, a notice of appeal was timely filed in the land office by the mineral patent applicants. The notice of appeal stated that a statement of reasons for the appeal would be filed in accordance with regulations within the time allowed.

The departmental regulations provide that where the notice of appeal does not include a statement of reasons for the appeal, such statement must be filed in the office of the Director, Bureau of Land Management, within 30 days after the notice of appeal was filed. 43 CFR 1842.5-1. The regulations also provide that with the exception of the time fixed for the filing of a notice of appeal, the time for filing a document in connection with an appeal may be extended by the officer to whom the appeal is taken. 43 CFR 1840.0-6(g). The Appeals Procedures further provide for summary dismissal of an appeal where the statement of reasons for the appeal is not included in the appeal and is not filed within the time required. 43 CFR 1840.0-7(a).

The record shows that the appellants filed numerous timely requests for extensions of time within which to file a statement of reasons for the appeal. The most recent extension was allowed to and including June 30, 1969. The appellants did not within the extended period and have not since filed a statement of reasons for the appeal.

Accordingly, the appeal is dismissed. United States v. Roberta P. Beeks et al., A-30740 (December 19, 1966).

Humboldt Placer Mining Company and Del de Rosier have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included

in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $150. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
William B. Murray, Attorney for Appellants (Certified Mail)
Claud E. Phipps, President, Humboldt Placer Mining Co.
Mr. Del de Rosier
Regional Forester, Forest Service, U.S. Dept. of Agric.
SD (California)
LO (Sacramento)
Case File
DDRF
Ap. & He. R/F
Binders

appeal to Sec A31213 Dismissed 12-18-69

Multiple Mineral Development: Act of July 23, 1955: Verified Statement 3512.9

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claims, in order to prevent the claims from being held subject to the terms and limitations of section 4 of that act, it must be shown that there was a discovery of valuable mineral deposits within the claims at the date of the act.

Mining Claims: Discovery 3413

Where a mining claimant has not shown by a preponderance of the evidence that it has made a discovery of a valuable mineral deposit on either of its claims prior to July 23, 1955, such as would justify a prudent man in the expenditure of his labor and means, with a reasonable expectation of developing a paying mine, the claims are properly subjected to the limitations and restrictions of section 4 of the act of July 23, 1955.

United States v. Golden State Mining Company, Sacramento 060347 C-2 and C-3 (September 18, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 SEP 29 AM 10 00

In reply refer:
142
Sacramento 060347 C-2
and C-3

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

September 18, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America	:	Involing the Jimmie Boy Nos.
	:	2 and 3 lode mining claims
v.	:	(M.S. 6640), located in Sec.
	:	31, T. 22 N., R. 8 E., M.D.M.,
Golden State Mining Company,	:	Plumas County, California
Charles G. de St. Maurice,	:	(within the Plumas National
President	:	Forest).
Mining Claimant-Appellant	:	

Decision Affirmed
as Modified

Golden State Mining Company has appealed from a Hearing Examiner's decision, dated October 21, 1968, which held that there is no discovery of a valuable mineral deposit on either of the subject lode mining claims, and that the claims are, therefore, subject to the limitations and restrictions specified in section 4 of the act of July 23, 1955, 30 U.S.C. §§ 611-615 (1964).

The Examiner's decision was rendered as a result of a hearing held at Yuba City, California, on May 10 and 13, 1968, pursuant to a verified statement filed by United Mining Company, predecessor in interest of Golden State Mining Company, claiming surface rights to the lands in the claims contrary to or in conflict with the restrictions and reservations specified in section 4 of the act of July 23, 1955, supra. Pursuant to section 5(c) of the said act, a surface rights determination proceeding was initiated by the Bureau of Land Management at the request of the Forest Service, United States Department of Agriculture.

The Jimmie Boy No. 2 claim was originally located on August 6, 1945, and the Jimmie Boy No. 3 was located on September 25, 1953. Both claims were amended on November 25, 1957, for the purpose of conforming the original locations and the boundaries thereof to an accurate survey made upon the ground. Thus, the claims antedate the act of July 23, 1955, supra, and are subject to this surface rights determination.

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claims, in order to prevent the claims from being held subject to the terms and limitations of section 4 of that act, it must be shown that there was a

discovery of valuable mineral deposits within the claims at the date of the act, and that the claims are still valuable for the mineral deposits. United States v. Independent Quick Silver Company, 72 I.D. 367, 380 (1965), affirmed Independent Quick Silver Co. v. Udall, 262 F. Supp. 583 (D. Oregon 1966). The issue in this case is not whether there has been a discovery but whether a discovery was made upon either of the claims in question prior to July 23, 1955, United States v. Ford M. Converse, 72 I.D. 141, 146 (1965), affirmed Converse v. Udall, 262 F. Supp. 583, 593 (D. Oregon 1966), in turn, affirmed by the Ninth Circuit Court of Appeals in Converse v. Udall, 399 F. 2d 616, 622 (1968), cert. denied by the Supreme Court on January 13, 1969, 89 S. Ct. 635; United States v. Adam J. Flurry, A-30887 (March 5, 1968). The following holding of the Department in United States v. Ford M. Converse, supra, (at page 146) was also judicially approved by the courts in their decisions of affirmation:

> It was therefore necessary, in order to establish the fact of a discovery prior to July 23, 1955, to demonstrate such discovery on the basis of showings of mineral value from portions of the claims exposed prior to that date. It was for this reason that the hearing examiner rejected most of the appellant's evidence based upon mineral showings exposed at a subsequent time.

The requirements for a discovery of valuable minerals are set forth in the so-called "prudent man" test enunciated in Castle v. Womble, 19 L.D. 455 (1894), which was approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963). The elements necessary to a valid discovery in a lode mining claim were set forth in Jefferson-Montana Copper Mines Co., 41 L.D. 320, 323 (1912), as follows:

> 1. There must be a vein or lode of quartz or other rock in place;
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.
>
> It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not. (Emphasis supplied).

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case as to non-discovery, and the burden then shifts to the contestee to establish the validity of his claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

The Hearing Examiner's decision is based on his conclusion that there is no present discovery of valuable minerals on either of the claims. He did not mention in his decision the necessary requirement for a discovery on or prior to July 23, 1955; however, his determination that there is no present discovery on the claims precluded the necessity for him to determine whether or not discoveries existed on the claims on July 23, 1955. Even though there may have been a discovery on a mining claim prior to 1955, the claim must have continuing validity in order to prevent it from being subjected to the limitations and restrictions of section 4 of the 1955 act, supra. A discovery may be lost for various reasons, such as the fact that the mineral deposit is worked out or has become invaluable because of a change in economic conditions. See United States v. Independent Quick Silver Company, supra, at page 380. However, because of the status of the case record, as will be explained hereinafter, we do not find it necessary to determine in this decision whether or not a present discovery exists on either claim, as it is clear from the evidence that no discovery of valuable minerals existed on either claim prior to July 23, 1955.

Our determination that no discovery was made on either claim on or prior to July 23, 1955, hinges on the evidence adduced through the testimony and documentary evidence offered by the Government's witness, Henry W. Jones, and that of Mr. St. Maurice, which is pertinent to the conditions existing on the claims on and before July 23, 1955. Other witnesses testifying for the mining claimant were Mr. Allen I. Lander, a miner and one of the lessees of the mining claimant, Mr. Howard J. Adams, one of the owners of the claimant corporation, and Mr. J. F. Siegfried, a consulting engineer who does mining work in geology; however, the testimony of these witnesses was not pertinent to the question of whether discoveries existed on the claims on July 23, 1955, as it relates to areas that were not exposed on or before that date, and to samples that were taken from these previously unexposed areas.

Mr. Jones testified that on November 13, 1966, Mr. St. Maurice showed him the various cuts and trenches on the claims, and the locations of what he considered to be his most mineralized segments as exposed by these cuts. On the Jimmie Boy No. 2 there was a bulldozer trench cut at the discovery point, approximately 8 feet deep and 40 feet long. Subsequent to November 13, 1966, Mr. St. Maurice put in a backhoe trench approximately 200 feet east of the first discovery point. Mr. St. Maurice did not show him any other workings on the Jimmie Boy No. 2. There was some trenching

at the west end of the Jimmie Boy No. 3 about 150 feet long and 15 to 20 feet deep in the center of the trench. In late 1967 the trench was enlarged so there is considerable working in this particular area. There was also a large shallow bulldozer trench near the southern border of the claim which extended south of the claim for a considerable distance.

Mr. Jones sampled the claims in the presence of Mr. St. Maurice. His initial samples were taken in these trenches in locations which he considered would have the most possible value over possible working width. His first seven samples assayed at values ranging from $1.05 to $3.50 per ton in gold (Ex. 7). Later Mr. St. Maurice informed him that he (St. Maurice) had obtained some high assays from the same general locations. Mr. Jones, therefore, again looked at the claims with Mr. St. Maurice after the additional bulldozing had been done. He examined the discovery cuts where Mr. St. Maurice had claimed to have taken samples of considerable value from the same locations where Jones had taken his previous samples. Jones then took five samples: two from the discovery trench and one from the backhoe trench on Jimmie Boy No. 2 and one each from the discovery trench and dozer trench in the south center portion of the Jimmie Boy No. 3. The assay report from Abbot A. Hanks shows a trace of gold for three of the samples and $2.80 and $0.875 per ton in gold for the other two (Ex. 8). Because of Mr. St. Maurice's claimed high assays, Jones had the pulps of these five assay samples submitted to Metallurgical Laboratories, Inc., for a cross check. The latter's assay report (Ex. 9) was substantially similar to Abbot A. Hanks', showing a trace for two of the samples, and $0.70, $3.32 and $0.70 for the other three. The locations of all of Mr. Jones' samples and the workings on the claims which he examined are shown on a map of the claims (Ex. 6).

There was a series of small quartz veinlets in the shale material over a width of perhaps 15 feet. Mr. Jones expressed the opinion that a reasonably prudent man would not be justified in expending further time or money on these claims, as the small veinlets have little value and are only a few inches at most in width. In order to be worked profitably they would have to be considerably larger than any he had seen and would have to run between $20 and $25 over a 3-foot width. He tried to investigate some vein structure on the Jimmie Boy Nos. 2 and 3, but was prevented by the deep overburden and cover. The only possible examination was of the exposures in the existing cuts. He saw only little veinlets.

Mr. St. Maurice testified that he first visted the area of the claims in 1945. He prospected the area and made investigations of the Mary Ann Mine and surrounding area with a view to purchasing properties for the United Mining Company for the development and operation of a gold mine. He obtained a report on the Mary Ann Mine dated August 15, 1936, by Samuel Emmons Chamey, a mining engineer, from the attorney for the then owner of that mine (Ex. A). United Mining Company, of which he was a partner, then purchased the Mary Ann. Exhibit B is a map of the Mary Ann Mine and the subject claims showing, inter alia, the locations of the discovery trench on the Jimmie Boy No. 2 and the discovery shaft on the Jimmie Boy No. 3, as well as some of numerous samples taken on the two claims from 1959 to 1968. The discovery shaft on the Jimmie Boy No. 3 is indicated near the west end of the claim, and, from

the map scale of 1" 200', appears to be about 20 feet square, and slightly to the east thereof is a large bulldozer cut made in 1966. Just to the east of the latter there appears to be another trench which is not labeled. A Mr. Beckwith, now deceased, prospected the area under his direction in 1945 in the discovery trench of the Jimmie Boy No. 2, which was a shallow hand-dug shaft or pit. Mr. St. Maurice was not present when Mr. Beckwith made his first discovery, but he and Beckwith visited the property about two weeks later and took some samples which he had assayed. The pit or hole was about 4 feet in diameter, and the cut for the sample was about 3 feet wide. They took several samples there, and the one that they used for discovery assayed about $20 to $24. He did not have the assay results.

Mr. St. Maurice further testified that the Jimmie Boy No. 3 was located in 1953, at which time Mr. Beckwith took a sample in his presence which, as best he could recall, assayed around $20 to $23 per ton. At that time there was a very shallow dipped pit at the easterly end of the Jimmie Boy No. 3, but he did not know whether a sample had been taken from that pit at that time. The pit has since been destroyed by new workings. His company spent approximately $80,000 in exploration and drifting in the Mary Ann Mine between the years 1945 and 1959, and he understands that a considerable return has been recovered from the Mary Ann Mine in the past. The veins on the two claims are identical to the vein structure on the Mary Ann Mine. He expressed the opinion that an ordinary prudent prospector would expend time, effort and money on the claims with a reasonable expectation of producing a paying mine.

On cross-examination Mr. St. Maurice stated that he has been interested in the Mary Ann Mine since 1945, but he and his associates have sold no mineral during this time. He considered that discoveries were made on the subject claims from six months to a year before they were posted, and that this referred to values other than those set out in Exhibit B. He omitted the discovery values on Exhibit B because he cannot locate the assay sheets, and is speaking only from memory with respect to them. He indicated to Mr. Jones that the actual discovery shaft on the Jimmie Boy No. 2 had been bulldozed out and deepened.

This is all of the evidence presented by Mr. St. Maurice which is pertinent to a determination of whether or not there were discoveries on the claims on or prior to the critical date of July 23, 1955. Additional evidence presented by Mr. St. Maurice, pertaining to occurrences subsequent to 1955, will be set forth later in this decision for the purpose of clearing up a matter in the record, although it now has no direct bearing on the case in view of our determination that there was no discovery on either claim prior to July 23, 1955.

The Department has repeatedly held that in order to constitute a discovery upon a lode mining claim there must be physically exposed within the limits

of the claim a lode or vein bearing mineral of such quality and in such quantity as to warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, and that it is not sufficient that the exposed mineralization merely gives rise to a hope or expectation that a valuable mineral deposit may be found. See United States v. Evelyn M. Kiggins et al., A-30827 (July 12, 1968), and cases cited. The size of the vein, as far as disclosed, and the quality and quantity of mineral it carries are factors laid down in Jefferson-Montana Copper Mines Co., supra, to be considered in determining whether there is a valid discovery in a lode claim. Mineral must exist in sufficient quantities to justify the expenditures of money for the development of a mine and the extraction of the mineral, and the existence of such mineralization must be demonstrated, in the case of a lode claim, by the exposure within the limits of the claim of a vein or lode of mineral-bearing rock in place, possessing in and of itself, value for mining purposes. See United States v. Adam J. Flurry, A-30887 (March 5, 1968) and cases cited. In Converse v. Udall, supra, the Court of Appeals for the Ninth Circuit said: "Thus it was made clear as long ago as 1888 that the finding of some mineral, or even of a vein or lode, is not enough to constitute discovery--their extent and value are also to be considered."

In United States v. Emerald Empire Mining Co., A-30445 (December 3, 1965), the Department held (syllabus): "Geological inference cannot be used as a substitute for or mitigating factor in the absence of a finding of sufficient mineral value on the claim involved so as to constitute a discovery." (Emphasis added). The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. See United States v. John L. Cooper, A-30267 (May 11, 1965).

With respect to the Government's burden of presenting a prima facie case, the Department has consistently held that it is the duty of a mining claimant to keep discovery points available for inspection by Government mining examiners, that an examiner has no duty to rehabilitate discovery points or to explore beyond the current workings of the mining claimant, and that a claimant errs in assuming that the Government has an affirmative duty to search for indications of the discovery of valuable mineral deposits on a mining claim. United States v. Taylor Crossland and Alice Crossland, A-30998 (April 18, 1969), and cases cited.

We are of the opinion that the Government established a prima facie case through Mr. Jones' testimony. Mr. St. Maurice showed him the various workings on the claims, including the discovery cuts and the locations of his most mineralized exposures. He originally took seven samples from the cuts which assayed for nominal values in gold; three of the samples were taken from the discovery trench on the Jimmie Boy No. 2 and three from the discovery trench on the Jimmie Boy No. 3. Later he examined the

cuts in the company of Mr. St. Maurice after the latter had informed him that additional bulldozing had been done and that he had obtained some high assays from the same general locations as he (Jones) had previously sampled. He took five additional samples, two of them being from the discovery cut on the Jimmie Boy No. 2 and one being from the discovery cut on the Jimmie Boy No. 3. These samples assayed at nominal or trace values in gold. He then sent the pulps to another laboratory for assay, which laboratory obtained substantially similar results as the first laboratory. He never saw any veins on the claims--only little veinlets a few inches in width at most. He said that a prudent man would not be justified in expending further time or money on the claims because the veinlets would have to be considerably larger than any he had seen on the claims, and the material would have to run between $20 and $25 over a 3-foot width to be of economical value. In other words, his examination disclosed both insufficient quality and quantity of mineralization.

The appellant contends that the Government failed to establish a prima facie case for the following reasons, which we have numbered for the sake of convenience and clarity in our discussion of them: (1) It failed to show lack of a discovery prior to July 23, 1955; therefore, it must be conclusive that there was a discovery on these properties prior to July 23, 1955; (2) there is no proper qualification of Mr. Jones as a witness to testify as to what a prudent prospector would or would not do; (3) Mr. Jones did not investigate the full extent of the veins on the claims because the heavy overburden precluded him from doing so, and he did not consider other mines in the vicinity, or the fact that the claims are in a valuable mining district, which is contrary to the operative language of the Jefferson-Montana case, supra; and (4) Mr. Jones erroneously indicated that there can be no discovery unless there is immediate commercial value to the claims. We will discuss these reasons under the corresponding numbers.

(1) The evidence is clear that the Government did, in fact, establish a prima facie case of lack of discovery prior to July 23, 1955. Jones examined and sampled the discovery cut on each claim, which samples were taken from areas that were exposed before the date of the act. He even took samples from the same areas at a later date after further bulldozing had been done in the excavations, including one sample from the backhoe trench that the mining claimant had made just to the east of the discovery trench on the Jimmie Boy No. 2 in the interim. Government samples taken subsequent to the date of the act in areas which were exposed on or before that date are admissible in this type of proceeding. See the District Court's decision in Converse v. Udall (1966), supra, (at page 593), and the 1968 affirming decision of the Circuit Court of Appeals in the same case (at page 622). The fact that the cuts had been enlarged and deepened since 1955, and the Government mineral examiner still found only insignificant gold values in little veinlets of only small extent, makes the Government's case even more persuasive.

(2) As for the Government witness' qualification to testify as to what a prudent prospector would do, as a qualified mining engineer he may express expert opinions on matters which are within his field of expertise. In a recent decision in the case of United States v. Arne Simon Erickson, A-30942 (January 17, 1969), the Department said: "* * * in Udall v. Snyder, --F. 2d-- (No. 9671, 10th Cir., May 24, 1968), the circuit court of appeals reversed the district court on the basis of United States v. Coleman, 390 U.S. 599 (1968), stating that the Supreme Court had made it plain that 'the government witnesses /mining engineers/ were competent to testify as experts with reference to the prudent man test. * * *' (Slip copy, p.3.)"

(3) Mr. Jones' failure to investigate the full extent of the veins on the claims because of the heavy overburden does not detract from the Government's case. A mineral examiner has no duty to rehabilitate discovery points, to explore beyond the workings of the mining claimant, or to search for indications of discovery on a mining claim. United States v. Taylor Crossland and Alice Crossland, supra. The fact that the claims are in a mining district and that other claims in the vicinity have produced are tantamount to geologic inference. While these are factors that may be considered in some cases, geological inference cannot be used as a substitute for discovery in the absence of a finding of sufficient mineral value on the claim involved itself. United States v. Emerald Empire Mining Co., supra.

(4) In contending that Mr. Jones had indicated that the claims must have immediate commercial value and marketable ore in order to constitute a discovery, the appellant is relying on certain statements made by Jones on cross-examination, which are taken out of context, and is overlooking the true tenor of Jones' overall testimony, which is to the effect that minerals are not exposed of sufficient quality and in sufficient quantity to justify the costs of extraction and sale, and a prudent man would not be justified, therefore, in expending further time and money on the claims with a reasonable expectation of developing a paying mine. The Department has long applied the so-called "marketability test" in cases involving non-metallic minerals of widespread occurrence. In United States v. Coleman, 390 U.S. 599 (1968), the Supreme Court upheld the marketability test as a logical complement to the prudent man test of Castle v. Womble, supra. Although Coleman involved building stone, the Court of Appeals for the Ninth Circuit in Converse v. Udall (1968), supra, held that the prudent man test, complemented by the marketability test, is to be applied with varying degrees of strictness to precious metals, base metals as well as minerals of widespread occurrence. See the remainder of the Court's discussion on this matter (at pages 622-623). The case of Garula v. Udall, 268 F. Supp. 910 (1967), relied upon by the appellant, has been reversed by the Tenth Circuit Court of Appeals in Udall v. Garula, 405 F. 2d 1181 (1968), and the other case cited by appellant, Henault Mining Co. v. Tysk, 271 F. Supp. 474 (D. Mont. 1967), has been appealed to the Ninth Circuit, but as yet has not been decided.

The appellant further contends that it has clearly shown discovery on the two claims by a preponderance of the evidence. With this we disagree. In support of this contention, the claimant relies heavily on the testimony of witnesses pertaining to areas that were not exposed on or prior to July 23, 1955, and on a few high-value samples that were taken from excavations made in 1966, 1967 and 1968. Mr. Siegfried took a sample from a 1966 bulldozer cut on the Jimmie Boy No. 3 which is valued at $431.60 per ton. He also took three other samples from this cut and seven samples from 1966 and 1967 cuts on the Jimmie Boy No. 2; of these ten additional samples, five of them contained no mineral values while the remaining five contained values of $0.35, $0.70, $0.70, $10.50, and $18.20 per ton (Tr. 174-180 and Ex. M). Mr. St. Maurice presented evidence of sample values of $508.90, $387.80, $21.00, $7.00, and $49.00 per ton from 1966, 1967 and 1968 cuts on the Jimmie Boy No. 2 and $42.00 and $21.00 per ton for samples taken from the 1966 bulldozer cut on the Jimmie Boy No. 3 (Exs. B, D, and E). Exhibits D and E show numerous other samples taken from these excavations containing no values or insignificant values. Samples taken by a mining claimant from areas that were not exposed on July 23, 1955, are inadmissible for proving that discovery existed as of that date. See the court decisions in Converse v. Udall, supra. Claimant also relies on opinions expressed by its witnesses of various factors pertaining to geological inference, a matter which we have already disposed of hereinabove.

For proof of discovery on the claims prior to July 23, 1955, the appellant relies on the testimony of Mr. St. Maurice. He stated that he visited the area in 1945 and with a Mr. Beckwith, now deceased, took several samples from the discovery pit on the Jimmie Boy No. 2 claims, which was about 4 feet in diameter, the cut being about 3 feet wide, and that the sample they used for discovery assayed about $20 to $24. The Jimmie Boy No. 3 was located in 1953, at which time Beckwith took a sample in his presence which, as best he could recall, assayed around $20 to $23 per ton. Although the size of the discovery pit on Jimmie Boy No. 3 was not given, the pit is shown on claimant's map (Ex. B) and, from the map scale, it is very small, being approximately 20 feet in diameter. Mr. St. Maurice did not have the assay returns, and his testimony as to values has little probative value for that reason. However, accepting the values which he gave from memory as being reasonably correct, they would be insufficient to establish discoveries on the two claims because of the small size of the so-called discovery pits. In other words, the sizes of the veins exposed at that time on the two claims did not possess, in and of themselves, value for mining purposes. United States v. Adam J. Flurry, supra.

Because the Examiner made the statement that his decision only affected the claimant's right to manage the surface resources on its claims, and the claimant is not precluded from perfecting the claims and obtaining a patent thereto, the claimant contends that the Examiner had no right to inferentially equate the statutory discovery tests with the more stringent patent tests. The same rules as to the burden of proof apply in a proceeding under the 1955 act as apply to other cases where the Government contests a claim, including a claim embraced in a mineral patent application. United States v. Independent Quick Silver Company, 72 I.D. 367, 379 (1965), supra.

Accordingly, the Hearing Examiner's decision of October 21, 1968, is hereby affirmed, as herein modified.

This decision does not extinguish the claims. The appellant is at liberty to carry on his mining operations on the claims so long as they do not interfere with the rights of the United States to manage the surface resources and to dispose of the vegetative resources thereon as defined in section 4 of the act of July 23, 1955, supra, and so long as valid discoveries may exist on the claims prior to any intervening rights that may occur.

The appellant has raised some objections to a joint sampling which the Hearing Examiner ordered to be conducted on the claims after the hearing was held, which objections have some merit. We believe that the Examiner erred in certain respects in connection with the joint sampling, and we think that it is desirable to discuss the matter for the purpose of setting the record straight, although the joint sampling has no bearing on our holding herein. It pertains predominantly to areas that were not exposed until after July 23, 1955, and would, therefore, have a bearing only on whether or not there are present discoveries on the claims. For a better understanding of the matter, we deem it desirable to brief the additional testimony and documentary evidence offered by Mr. St. Maurice, as well as pertinent evidence offered by Mr. Siegfried.

Mr. St. Maurice further testified that prior to the time the discovery cut on the Jimmie Boy No. 2 was deepened by bulldozer, he took a sample in 1961 which assayed $20.13 in gold per ton (Exs. D and B). Exhibit D is a list of 24 samples taken by Mr. St. Maurice or under his direction from the Jimmie Boy No. 2 claim on various dates from October 6, 1959, to April 22, 1968. The assay reports are attached as a part of the exhibit. In addition to the $20.13 sample, supra, the list contains a few high-value samples. Three samples taken on September 20, 1967, from a 1966 bulldozer cut are valued at $387.80, $21.00 and $7.00 per ton in gold; one sample from a 1967 backhoe cut is valued at $508.90; and a sample from a 1968 bulldozer cut assayed at $49.00 per ton in gold. These three cuts are located in the northeast part of the claim some distance from the discovery trench, as shown on Exhibit B. The remaining 18 samples shown on Exhibit D contain either minor or no values.

Exhibit E is a list of 27 samples taken from the Jimmie Boy No. 3 on various dates from October 6, 1959, to October 12, 1967, with the assay certificates also attached. Only the four highest value samples are shown on the claim map (Ex. B): a $22.58 sample from the discovery shaft a $42.00 sample from the 1966 bulldozer cut just to the east of the discovery shaft, a $21.00 sample from the same cut and a $68.60 sample near the easterly center

line end of the claim. This list also shows a $5.95 sample from the discovery shaft and a $10.15 sample from the hanging wall of the discovery shaft, taken on October 21, 1959, and August 9, 1965, respectively. The remaining 21 samples have values ranging from nil to $7.00 per ton. The three cuts in the northeast portion of the Jimmie Boy No. 2 expose vein matter and small quartz veins in a heavily oxidized zone. The quartz veins are deteriorated to a very nominal size, but Mr. St. Maurice considers that the vein matter extends over a width of 6 to 8 feet. The vein matter on the easterly end of the Jimmie Boy No. 3 is around 7 to 8 feet, and the vein matter on the westerly end is about 48 to 60 inches wide, where the major workings are. The veins on the two claims are identical to the vein structure on the Mary Ann Mine, from which mine he understands a considerable return has been recovered in the past. His company has entered into a mining lease of the two claims with Allen I. Landers and Chester McKinney (Ex. G), and it was his understanding that the lessees were unloading equipment on the property, (on the day of the hearing), and that the lessees would commence operations in the three cuts in the northeast portion of the Jimmie Boy No. 2--the 1966, 1967 and 1968 cuts.

Mr. J. F. Siegfried, one of the claimant's expert witnesses, testified to the taking of several samples on the two claims. One of the samples, taken from the 1966 bulldozer cut on the Jimmie Boy No. 3, assayed at $430.50 per ton in gold. He also described the similarity of the veins with those on the Mary Ann Mine.

Because of the several high-value samples presented by the claimant, the Hearing Examiner, upon the recommendation of the Government's attorney, and over the vigorous objections of the claimant's attorney, ordered a joint sampling of the claims by the parties to be conducted under the supervision of a referee, the record to be kept open pending receipt of the referee's report. On June 27, 1968, he issued a formal order for the joint sampling to be conducted on August 8, 1968. He appointed Mr. Paul Fillo, a mining engineer of the United States Bureau of Mines, as the referee, who was to prepare a written report of the sampling.

Under date of July 1, 1968, the mining claimant's attorney wrote to the Hearing Examiner, as follows:

> I am in receipt of * * * your order dated June 27, 1968, wherein it is stated, "The parties having heretofore informally agreed thereto, ..." The record is clear that we did not agree to any part of the order that you are making; in fact, we strenuously objected to it because we do not believe it is proper or necessary.
>
> Our only agreement, if such it be, was that in response to your telephone inquiry giving us three available dates upon which you were to make an order, we selected one of

> the three, namely, August 8, 1968. It was definitely understood in our telephone conversation that you would make an order for one of these three days, and it was just a question of which of these three days might be more convenient to Mr. St. Maurice. Accordingly, your order should be amended to reflect the correct situation.
>
> Likewise, we object to the reference in the order and in your letter of June 5 referring to the sampling to be taken by Mr. Fillo as a "joint sampling." This sampling is being done under your direction, pursuant to your order, over our objection, and not by our request. I believe in all fairness it most properly should be referred to as an independent sampling under your direction.

On August 15, 1968, Mr. Fillo reported the results of the so-called joint sampling as follows:

> Pursuant to your * * * Order * * * dated June 27, 1968, representatives of the U.S. Department of Agriculture (Forest Service), Messrs. W. L. Johnson and Henry Jones, and the mine owner Mr. Charles G. de St. Maurice and his mining consultant, J. F. Siegfried, met on the mining claims as scheduled. Both parties agreed on the locations of where the 31 channel cut samples should be taken. The claimant did not attempt to take any samples. He and his consultant approved the procedure the Forest Service personnel used in taking the samples. * * * Both parties agreed on Abbot A. Hanks Assay Company * * * to perform the work of assaying the samples. * * *. (Emphasis supplied.)
>
> The attached table describes the size of the channel cut samples and the material that was intersected. It appears that much of the claim area is underlain by shales or slates of probable carboniferous age and metavolcanic rocks of probable Jurassic-Triassic age. These rocks are intruded by small masses of diorite and thin quartz veins of Tertiary age. The narrow quartz veins where exposed on the property appear to lack strong continuity.

Most of the samples were taken from 1966 and 1967 excavations on the claims, and all of them contained very nominal or infinitesimal values.

Upon receipt of the report of the so-called joint sampling, the Examiner issued a formal Order on September 19, 1968, referring to the assay values of the samples, and stating that no valid reason exists for reopening the hearing for further testimony. He, therefore, ordered that the record be closed and that the case be submitted for decision on the present record.

In his appeal brief with reference to this matter, the claimant's attorney said:

> The third member of the governmental triumvirate, Mr. Jones, was the one who, in fact, took the actual samples. This in itself was contrary to the order of the hearing examiner who in his June 25, 1968, letter stated that samples were to be taken "in the presence of each other under the direction of Mr. Paul Sillo /sic/, Bureau of Mines, Reno, Nevada." The "joint sampling" was but a unilateral sampling by Mr. Jones who in light of the record could not provide the disinterested sampling which could only be the purpose of the "joint sampling." The mining claimants were not permitted to submit any samples at this time.
>
> * * * This is contrary to 43 CFR which states in Section 1852.3-6 that "witnesses shall be subject to cross-examination." In other words, it is a very critical area to determine how the material was sampled, and, in this later "joint sampling" Mr. Jones was subject to no check whatsoever. At the time, Mr. St. Maurice cautioned Mr. Jones and pointed out to him that his sampling was not acceptable in that Mr. Jones took what he deemed an "average sample," which meant that some of the mineralized rock was discarded from the sample channel cuts. All this lies without the record by the fact that the sampling was post hearing and is unchallenged by the lack of cross-examination.

It is obvious from the above that there is considerable disagreement between the parties over this so-called joint sampling. We are of the opinion that the report of the joint sampling by the so-called referee has no probative value whatsoever, and, if we found it necessary to determine whether or not a present discovery exists on the claims, we would probably remand the case for a further hearing to give the parties the opportunity of examining and cross-examining all of the persons who took part in the sampling, including the referee.

Proceedings of this nature are conducted in accordance with the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, now codified in 5 U.S.C. § 551 et seq. (1968), and the Department's regulations pertaining to Hearing Procedures, 43 CFR Part 1850, 1/ which are in compliance with the Administrative Procedure Act. Subsection 556(b) of Title 5, U.S. Code, provides that (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more hearing examiners appointed under section 3105 of Title 5, shall preside at the taking of evidence at these hearings. Subsection 556(c) lists the powers of officials presiding at the hearings. These provisions are limited and explicit as to presiding officials and their powers. There is no provision in the law authorizing a hearing examiner to appoint a referee to preside over the taking of evidence, which was what was done in

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1/ See 43 CFR 3513.3.

this case. Cf. Reliance Steel Products Company v. United States, 150 F. Supp. 119 (1957). Black's Law Dictionary (4th Ed. 1951) defines the term "referee" as follows:

> In practice. A person to whom a cause pending in a court is referred by the court, to take testimony, hear the parties, and report thereon to the court. /Citation omitted./ He is an officer exercising judicial powers, and is an arm of the court for a specified purpose. /Citation omitted./

The so-called referee was not duly authorized to exercise judicial powers. Thus, his report to the Hearing Examiner on the sampling, including his volunteered characterization of the vein structure on the claims, can have no probative value and is not an official report of which official notice can be taken by the Examiner. The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision, 5 U.S.C. subsection 556(e); 43 CFR 1850.0-8(a)(1). Subsection 1850.0-8(a)(3) provides that the record made at a hearing in a contest shall be the sole basis for decision except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section. 2/ A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts, 5 U.S.C. subsection 556(d). Thus, we conclude that the Hearing Examiner should have reconvened the hearing after receipt of the joint-sampling report for the purpose of permitting the parties to examine and cross-examine all of the persons who took part in the sampling, including the so-called referee. By his failure to do so, the report of sampling did not constitute a part of the case record which could be considered in his decision.

Joint samplings have been ordered by hearing examiners in the past where such wide variations in the sample results presented in evidence by the two parties made a meaningful determination very difficult, if not impossible. They are usually ordered, however, by and with the consent of both parties, and the reports of the joint sampling are signed by the persons conducting the sampling, thus becoming stipulated facts, and, as such, a part of the official record. Although this matter has no bearing on our decision in this case, we deemed it advisable to take this opportunity to attempt to clarify joint sampling of mining claims in connection with these hearings under the Administrative Procedure Act, supra.

2/ Paragraph (b) provides that official notice may be taken of the contents of the tract books, the serial registers, the approved plats of survey and other public records of the Department of the Interior and of any matter of which the courts may take judicial notice.

Golden State Mining Company has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Mr. Charles F. Lawrence,
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

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U.S. Department of Agriculture
Regional Forester, Forest Service, USDA
Office of the General Counsel, Division of Lands and Forestry, USDA
Forest Service, Division of Watershed Management, USDA (12)
Office of the Hearing Examiners, Sacramento, Calif.
300 (6)
200
Appeals List No. 1
Gower Federal Service

appeal to Sec
A-31223

Mining Claims: Contests 3482.2

Where a contestee has had ample opportunity to prepare on an issue raised or formulated at a prehearing conference, which is the issue upon which the decision rests, and where at the hearing the contestee expressly states that he does not claim surprise, thereafter he cannot claim lack of due process because of any deficiencies or inadequacies in the complaint.

Multiple Mineral Development: Common Varieties 3511

To satisfy the requirement of marketability of deposits of sand and gravel prior to July 23, 1955, it must be shown that the particular deposits could have been extracted, removed and marketed at a profit prior to that date; the sale of 30 yards prior to July 23, 1955, at a dollar a yard delivered, in the absence of any further development or production on the claims, is insufficient to establish that the deposits could be extracted, removed and marketed at a profit prior to the critical date.

Multiple Mineral Development: Common Varieties (Discovery) 3413

Where sand is alleged to be an uncommon variety because of its mica and silica feldspar content, and where credible evidence is lacking to show that the mica and silica feldspar content can be extracted, removed and marketed at a profit at the present time, it is proper to find a lack of a discovery of valuable minerals.

United States v. Harold Ladd Pierce, Contest No. R-0170646 (Riverside)
(September 26, 1969)

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DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

In reply refer to: 9
142 La
Contest No. R-0170646
(Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

September 26, 1969

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	H. L. Pierce, G. W. Pierce and Harold placer mining claims and Mill Site B, situated in sec. 24, T. 3 S., R. 3 E., S.B.M., Riverside County, California.
v.	:	
arold Ladd Pierce, Contestee	:	

Decision Affirmed

Harold Ladd Pierce has appealed from a Hearing Examiner's decision, dated vember 4, 1968, which declared the H. L. Pierce, G. W. Pierce and Harold placer mining claims null and void and the Mill Site B mill site claim invalid and which rejected the patent application Los Angeles 0170646 for them.

The proceedings were initiated by a contest complaint issued by the Riverside district and land office against the claims and the mill site, on May 20, 1965, charging that the land embraced within the placer claims is nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery; and, that the Mill Site B claim is not being used or occupied for mining, milling, beneficiation or other operation in connection with any placer or lode claim. A hearing was held on December 7 and 8, 1967, at which both parties were represented by counsel. Following the service of the Hearing Examiner's decision on the parties there was a change of counsel for the contestee.

The record made at the hearing discloses the following: The placer claims were located in 1948 and 1949 for sand and gravel used in the construction or landscaping industries, and for specialty sands used in the ceramic, glass and other industries. The latter industries require silica, feldspar and mica in the sand. The surface of the lower slopes on portions of the placer claims is covered with recent alluvial material, windblown sand in nature. The claims are near Palm Springs, California, and are accessible to the Los Angeles Metropolitan area. There is a general market for sand and gravel in the Los Angeles area for common and specialty purposes, and the market existed since the claims were located in 1948. There is a substantial tonnage of sand and gravel on the claims. Thirty yards of sand and gravel were sold for landscaping purposes prior to uly 1955. No commercial sales of material have been made for the specialty purposes mentioned by the contestee.

The Hearing Examiner, in relating the requirements for a valid discovery of a valuable mineral deposit in order to satisfy the mining laws, 30 U.S.C. § 22 (1964), quoted the time-honored "prudent man rule" enunciated in Castle v. Womble, 19 L.D. 455 (1894) [1]. He also referred to the requirement that, where a nonmetallic mineral of widespread occurrence is involved, the mining claimant is required to establish that the deposit can be extracted, removed, and marketed at a profit, and he noted that the Supreme Court recently approved the marketability requirement as a logical complement to the prudent man test of discovery, citing United States v. Coleman, 390 U.S. 599 (1968).

The Hearing Examiner mentioned that at the hearing there was some confusion as to the true issue to be determined. He properly stated that the complaint alleged that minerals have not been found in sufficient quantities to constitute a valid discovery; in this connection he noted, however, that for a material to be mineral locatable under the mining laws it must be valuable. He then pointed out that value for a sand and gravel deposit necessarily entails the elements of quantity, quality, and marketability. He stated that the Government stipulated the quantity of the deposit was sufficient, and that based upon this stipulation the contestee argued that there was no further issue concerning the mining claims since the complaint merely referred to "sufficient quantities." The Examiner held that the evidence presented by both parties related not only to quantity but also to quality and marketability. He stated that although the language in the complaint could have been more definite and certain, the contestee did not suggest that he was misled by the language in the complaint or that he had additional evidence to offer on the quality and marketability of the sand and gravel on the claims, and the contestee did submit evidence which was corroborated by the Government that the quality of the sand and gravel on the claims was sufficient for the more common uses and after beneficiation for industrial uses. He concluded that there remained to be determined the issue of whether the sand and gravel on the claims was marketable prior to July 23, 1955, [2] and whether the sand and gravel is presently marketable for industrial uses because of its constituent elements of silica, feldspar and mica.

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[1] A discovery exists only when minerals have been found in such quantities and of such quality "that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine."

[2] The date of enactment of the act of July 23, 1955, 30 U.S.C. § 601 et seq. (1964). Section 3 of the act, as amended, provides: "No deposit of common varieties of sand, stone, gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: * * * 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it a distinct and special value * * *."

The Hearing Examiner found that the sale prior to July 23, 1955, of 30 yards of sand and gravel for landscaping purposes from a deposit containing 5,000,000 tons cannot be considered as establishing the marketability of the deposits prior to July 23, 1955.

Further he noted that the same issue as to whether the sand and gravel is presently marketable for industrial uses because of its components of silica, feldspar and mica, was before the Department in another contest between the same parties concerned with mining claims which adjoin the three placer claims here involved, on the same kind of materials, with substantially the same evidence, citing United States v. Harold Ladd Pierce, 75 I.D. 270 (1968). In that case the Department held that the sand on the Jamie claim (located after July 23, 1955) is a common variety, pointing out, however, its locatability could be based upon a discovery of mica and silica feldspar rather than an uncommon variety of sand, and further that there was no present market for mica and as to the silica feldspar there was no credible evidence of its present marketability at a profit.

The Hearing Examiner properly held that in the present case the Government established that there are vast quantities of similar sand in the general area of the contested claims, that the ceramic and glass industries of California are presently being supplied by readily available sources of such sand elsewhere in the State, and that the Government agreed with the contestee that the quality of the sand on the three claims is satisfactory for numerous purposes, but also established that many deposits in the area can be used for the same purposes.

The Hearing Examiner noted that the contestee has experimented with pilot plants and has shown on a theoretical basis that the sand on the claims can be beneficiated and graded to a quality usable in the ceramic and glass industries. He referred to the testimony of Clifford O. Fiedler, a consulting engineer, machinery designer and witness for the contestee, to the effect that he could design a plant costing about $250,000 (additional equipment for the separation of mica would add $60,000 to $70,000 to the cost) to beneficiate 1,000 tons of material per month which would have a potential profit of $13,455 per month for the silica feldspar material, exclusive of the estimated profits to be derived from mica and other by-products. The Hearing Examiner correctly pointed out that it was not clear whether this proposed plant is the same plant proposed for the Jamie placer and two lode claims in the earlier Pierce case, supra, or whether it is to be operated in competition with the other plant. He was of the opinion that in either event the information submitted by the contestee again appears to be more in the nature of information supplied by a prospectus designed to induce the belief that a bonanza is available for the lucky investor; that, if such an investor is found and the plant is constructed, the theory might be converted into a fact, and that whether the investor is found today, tomorrow or is never found remains unknown. He also pointed out that until the proposed plant is constructed the only possible uses or market for the sand and gravel on the three claims are the common uses for which most sand and gravel can be used.

He then concluded that for these uses the materials on the claims are common varieties which were excluded from location after July 23, 1955. Finally, he declared that since no market was established for the materials prior to that date, and no market was established for the more uncommon uses after that date, the H. L. Pierce, G. W. Pierce, and Harold placer mining claims are null and void.

The Hearing Examiner also declared Mill Site B null and void for the lack of a supporting valid placer claim and the lack of use in connection with a locatable mineral, and he rejected mineral patent application Los Angeles 0170646 in its entirety.

On appeal and by separate motion, the contestee urges that the contest be summarily dismissed because the complaint did not state in clear and concise language the grounds of the contest and it is contrary to due process of law to require the contestee to defend against a charge that a mineral was a common variety or was not a valuable mineral deposit when all the charges against the placer claims were dismissed.

The record shows that the Hearing Examiner opened the hearing by stating for the record the matters stipulated or agreed to at a prehearing conference held in April 1967. He mentioned the dismissal of the first charge of the complaint. The other matters pertinent here are that:

> * * * there are two materials involved here, sand and gravel used for common purposes, of which thirty yards had been sold, or were sold prior to July 23, 1955, and specialty sand described as blow sand. (Tr. 1).
>
> * * * the quantity of both materials is sufficient. (Tr. 2).
>
> The remaining issue is whether the materials on the claims are common varieties within the meaning of the Act of July 23, 1955. (Tr. 2).

Subsequent to the Hearing Examiner's statement, Government counsel at the hearing moved that the complaint be amended. The motion was denied, after which the following exchange occurred (Tr. 9, 10 and 11):

> HEARING EXAMINER HOLT: * * * The issue is whether or not there is sufficient minerals on the claims to constitute a discovery, bearing in mind it must not be a common variety under the Act of July 23, 1955. That is the sole issue.
>
> MR. WHEATLEY (Government counsel): Okay. Well, I will proceed on that basis then.
>
> HEARING EXAMINER HOLT: All right.

> MR. BRIDGES (Counsel for contestee): I have registered my objection to that as being the issue.
>
> MR. WHEATLEY: All right.
>
> HEARING EXAMINER HOLT: I thought we agreed at the conference in April that that was the issue.
>
> MR. BRIDGES: It was my purpose at that time to eliminate the nonmineral character of that issue, the mineral character of the land, which we did. It was also my purpose to get a stipulation, if possible, regarding the sufficient quantity of the sand, which is the only mineral we are talking about.
> Now, my recollection is there was no amendment to the complaint asked for or stipulated at that hearing.
>
> HEARING EXAMINER HOLT: Well, are you claiming surprise now?
>
> MR. BRIDGES: I am not claiming surprise because my experience with the Government contest is they will bring the common variety out every time you turn around, Your Honor. I am claiming that the hearing will proceed not on the complaint if we proceed upon the issue you just stated.
>
> HEARING EXAMINER HOLT: Very well. Let us proceed.

In the instant case, the question is not the adequacy of the original complaint, but whether there has been notice to the contestee which provided sufficient opportunity to prepare on the issue formulated at the prehearing conference. Deficiencies in administrative pleadings may be cured by prehearing conferences. See Davis, Administrative Law Treatise, § 804 at 525 (1959). One of the stated purposes of a prehearing conference, according to departmental regulations, is the simplification or clarification of the issues. 43 CFR 1852.3-1(a)(1). Due process consists of notice and an opportunity to be heard. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The formulation of issues at a prehearing conference is a way of giving notice of an opportunity to prepare. In Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841-842 (D.C. Cir. 1950), the court, with regard to deficiencies in administrative pleadings, stated:

> It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern.

The appellant here was apprised of the issue formulated at the prehearing conference held eight months prior to the date of the hearing. Thus, there was actual notice to him with more than ample opportunity to prepare his case. Moreover, at the hearing, the then counsel for the contestee expressly stated that he was not claiming surprise. (Tr. 10). Furthermore, a careful review of the record made at the hearing, especially the evidence presented on behalf of the contestee and the cross-examination of the Government's sole witness, discloses that the issue involved was clearly understood. For these same reasons present counsel for the contestee cannot now claim lack of due process. Therefore, the contention is without merit, and the motion for summary dismissal of the contest is denied.

The appellant further contends that the decision below is contrary to law in that the invalidity of the mining claims was not established by any substantial evidence of lack of marketability. This contention is without merit.

In order to satisfy the requirements of discovery on a placer mining claim located for a common variety of sand and gravel prior to July 23, 1955, it must be shown that, prior to that date, the deposit could be extracted, removed and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the sand and gravel, i.e., that a demand existed when the deposit was subject to location. It is not enough to show that a market exists for sand and gravel and that a particular deposit is of such quality as to satisfy the standards of the market and that it occurs in such quantity as to make removal practicable; it must be shown, as well, that the particular deposit itself can, and could prior to the critical date, be mined and marketed at a profit. A critical factor is that, especially where mineral materials are of widespread occurrence, it must be shown that the minerals from the particular deposit in question could have been marketed at a profit prior to July 23, 1955. United States v. Alfred N. Verrue, 75 I.D. 300 (1968), and cases cited.

It was stipulated that there are about 5,000,000 tons of windblown sand on the subject placer claims. Further, the Government's witness testified that there are large quantities of comparable windblown sand within 1½ miles of the claims and that such sand deposits extend eastward for at least 20 miles along Highway No. 111. We conclude that these windblown sand deposits are widespread.

The evidence of sale of 20 or 30 yards of sand and gravel from the claims prior to July 1955 at a dollar a yard delivered (Tr. 283) falls short of establishing that the sand and gravel deposits on the claim could be sold at a profit prior to the critical date. The fact that nothing further was done prior to July 23, 1955, to develop the claims for the sand and gravel contained therein is persuasive that the market value of the materials was not sufficient to justify the expenditure required to extract and market them. Therefore, marketability prior to July 23, 1955, has not been established for the common varieties of sand and gravel on the subject placer claims, which were excluded from location after that date.

The Department in a prior Pierce case, supra, held that the validity of a mining claim may be based upon a discovery of silica feldspar and mica, constituent elements of the sand and gravel, instead of an uncommon variety of sand, but pointed out that it must be shown that such minerals can be extracted, removed and marketed at a profit at the present time.

Mr. Pierce maintained vigorously at the hearing that the sands on the subject claims are an uncommon variety, unique and distinct (Tr. 233) in that mica, silica feldspar, and heavy mineral constituents can be separated and the products of such separation result in biotite mica and a silica feldspar sand which can meet the chemical specifications of the glass and ceramics industries. The data presented by the appellant whether it pertained to one product or all the products he mentioned, on its face, shows not only assured financial success in each and every conceived operation without exception, but also handsome yearly estimated returns in relation to the initial investment. None of the products listed on Exhibit X-11 has been produced commercially from the claims and sold. They have only been produced in pilot runs and testings. Mr. Pierce admitted there is no plant and it is all proposed. (Tr. 278). He desires to obtain a patent to the placer claims and to lease them on a royalty basis to others who might construct the proposed plant.

As did the Hearing Examiner, we quote from the concluding portion of the earlier Pierce case, at page 288, as that decision succinctly states that which is apropos to the instant case in regard to inability to give full credence to all the evidence submitted by the appellant. It states:

> It seems quite clear that the appellant has no firm plans for developing the claims in issue. It appears that he has merely worked up sets of figures designed to entice others to make investments on his claims. In other words, his role is that of a promoter. There is, of course, nothing wrong with that. A mining claimant is not required to develop his own claim or to invest his own money in it. He can do so or he can sell it or lease it to another for development. However, the data developed for a promotional enterprise may be suspected of excessive optimism. It seems inconceivable that with so many alleged ironclad ways of making a profit from the claims, whether the investment be small or large, nothing has been done to commence a mining operation on the claims. * * *

It is the appellant who is the proponent that the materials on the claims are valuable for their constituent elements of mica and silica feldspar; therefore, he had the burden of showing by a preponderance of credible evidence that the constituent elements of the materials on the placer claims could be extracted, removed and marketed at a profit at the present time. This includes a favorable showing, inter alia, as to bona fides in development and the existence of a present demand in order to validate the placer claims. United States v. Everett Foster et al., 65 I.D. 1 (1958), aff'd in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959), and United States v. G. C. (Tom) Mulkern, [illegible]27746 (January 19, 1959), aff'd in Mulkern v. Hammitt, 326 F.2d 896 (1964).

The lack of bona fides in the development of the placer claims for the mica and silica feldspar, militates against a finding that there was or is an actual present demand for such deposits on the claims, because the materials on the claims in their natural state, in the absence of such development, are only common varieties of sand and gravel which by law are no longer locatable. Also, the fact that there has been no production for those elements in the sands on the claims is persuasive that existing sources have supplied the demand of the market. Appellant's belief that some day in the unforeseeable future when an alleged plant is built the mica and silica feldspar may prove to be valuable, is conjectural and speculative. This is not the showing required that the materials could be extracted, removed and marketed at a profit at the present time, in order to validate the claims.

As for the Mill Site B mill site claim, we believe that the claim was properly held to be invalid for the reasons given by the Hearing Examiner, namely, that it is not associated with a valid placer claim and its use is not in connection with a locatable mineral as required by statute. 30 U.S.C. § 42(b) (1964).

In view of the invalidity of the placer claims on the basis of lack of marketability before and after July 23, 1955, it is not necessary to rule on the contentions related to the amendments of the notices of location for the H. L. Pierce and G. W. Pierce placer claims.3/

Accordingly, the decision appealed from, declaring the H. L. Pierce Placer, G. W. Pierce Placer and Harold Placer mining claims and Mill Site B null and void, and rejecting the patent application for them, is affirmed.

Harold Ladd Pierce has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining or mill site claim included in the appeal. If the appeal covers all claims adversely affected by this decision, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

3/ The location notices for the H. L. Pierce and G. W. Pierce claims were amended several times subsequent to 1955. The description in the most recent amended notice of location for the H. L. Pierce, dated May 31, 1961, does not include any of the land described in the original location notice. The amended notice of location for the G. W. Pierce claim, also dated May 31, 1961, includes only a small portion of the land described in the original notice; however, that small portion was relinquished by the contestee in 1956, and was again included therein by the amendment of June 14, 1961.

In the event an appeal is taken, the adverse party is to be served through the:

Regional Solicitor
U. S. Department of the Interior
300 North Los Angeles Street
Los Angeles, California 90012

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:

Mr. John B. Lonergan, Attorney for Appellant (Certified Mail)
Mr. Harold Ladd Pierce
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Gower Federal Service
Appeals List No. 1

Sodium Leases and Permits: Preference Right Leases 3152

Where permittees under sodium prospecting permits have made discovery of valuable deposits of sodium within the lands under permit during the period to which the permit is limited but filed their applications for preference right sodium leases after the period set forth in 43 CFR 3152.5, the applications for the preference right sodium leases may be accepted, all else being regular.

William R. White, et al., R 31 etc. (October 16, 1969)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 OCT 31 AM 10 00

In reply refer to:
142
R 31
34
35

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 16, 1969

DECISION

William R. White :
Mauritz J. Kallerud :
Howard J. Winterbottom :
Occidental Petroleum Corporation :

Sodium

Cases Remanded

William R. White, Mauritz J. Kallerud, Howard J. Winterbottom, and Occidental Petroleum Corporation have appealed from a decision of our Riverside district and land office dated February 20, 1969, which rejected applications for preference right sodium leases from sodium prospecting permits R 31, 34 and 35, each issued November 1, 1966, for a two-year period ending October 31, 1968, for the reason that the applications were not filed within 30 days after expiration of the permits. 43 CFR 3152.5. The decision also stated that six pending assignments affecting the subject permits, filed for approval July 25, 1968, by Occidental Petroleum Corporation, would be given no further consideration as the permits have expired.

The appellants contend essentially that discovery of a valuable deposit of sodium was made in lands in each permit for which a preference right lease is requested, within the life of the permit, and that delay in filing the applications for preference right leases was caused by the failure of the land office to act promptly on the several assignments conveying record title to the permits to Occidental Petroleum Corporation.

The Director, Geological Survey, has confirmed, by a report dated October 3, 1969, that a valuable discovery of sodium was made within the lands contained in each permit during the life of the permit. The Geological Survey recommends issuance of the requested preference right leases.

Section 23 of the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 261 (1964), authorizes sodium prospecting permits for a period not to exceed two years. Section 24 of the Act, 30 U.S.C. § 262 (1964), entitles the permittee who shows discovery of a valuable deposit of sodium to a preference right to a sodium lease. As noted in the land office decision, the regulation 43 CFR 3152.5, provides that application for a preference right sodium lease must be filed not later than 30 days after expiration of the permit.

The record shows that the sodium prospecting permits R 31, 34 and 35 were issued November 1, 1966, to Messrs. White, Kallerud and Winterbottom, respectively. Assignments to Occidental Petroleum Corporation, together

with Occidental's request for approval of excess acreage under sodium lease, were filed for approval July 23, 1968. No action was taken by the land office on the assignments. The applications for preference-right leases were filed on December 13 and 18, 1968, each more than 30 days after expiration of the prospecting permits on October 31, 1968. 1/

The deficiency in the applications on appeal is from a regulatory requirement only. The right of each applicant to a preference right sodium lease because of timely discovery of a commercial sodium deposit is established in the record. In the circumstances, and in the absence of any specific statutory provision for mandatory rejection of a preference right sodium lease application where it is filed more than 30 days after the expiration of the permit period, it is considered that the delay in submission of the applications may be waived and that the preference right sodium leases may be issued, there being no intervening adverse interests and all else being regular. 43 CFR 1821.2-2(g), and see *Alice R. Rudie*, A-30061 (March 25, 1964), and *E. W. Danklef, et al.*, Utah 0103128 etc. (March 6, 1968).

The cases are remanded to the Riverside district and land office for further consideration and issuance of the requested preference right sodium leases and approval of the pending assignments to Occidental Petroleum Corporation, in the absence of other objection.

Chief, Office of Appeals
and Hearings

1/ Permit R 31, William R. White, embraced lots 2, 3, S½NE¼, SE¼NW¼, NE¼SW¼, NW¼SE¼ section 19, T. 26 S., R. 44 E., N½N½, SW¼NE¼, S½NW¼ section 21, N½N½ section 22, SW¼NW¼, NE¼SW¼, NW¼SE¼, S½SE¼ section 23, S½ section 24, T. 26 S., R. 43 E., M.D.M., California, for which a preference right lease was sought, as well as NW¼NE¼, S½NE¼, E½NW¼, NE¼SW¼, N½SE¼ section 20, SE¼NE¼, N½SW¼, SE¼SW¼, SE¼ section 21, S½N½, S½ section 22, NW¼SW¼, S½SW¼ section 23, T. 26 S., R. 43 E.

Permit R 34, Mauritz J. Kallerud, embraced SE¼NE¼, NE¼SE¼, S½SE¼ section 17, lot 4, SE¼SW¼, NE¼SE¼, S½SE¼ section 19, NE¼SW¼, S½NW¼, NW¼NE¼, NW¼SW¼ section 20, lot 1 section 30, T. 26 S., R. 44 E., M.D.M., California, for which a preference right lease was sought, as well as NE¼NE¼, S½NE¼, SE¼, NE¼SW¼, S½SW¼ section 20, N½, N½SW¼, NW¼SE¼ section 29, lot 2, NE¼, E½NW¼ section 30, T. 26 S., R. 44 E.

Permit R 35, Howard J. Winterbottom, embraced NE¼NE¼ section 26, N½N½ section 25, T. 26 S., R. 43 E., M.D.M., California, for which a preference right lease was sought, as well as NE¼NW¼, N½NE¼ section 28, N½NW¼, NE¼, NE¼SE¼ section 27, NW¼NE¼, S½NE¼, NW¼, N½S½ section 26, S½N½, NW¼SW¼ section 25, T. 26 S., R. 43 E.

DISTRIBUTION:

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William R. White
Mauritz J. Kallerud
Howard J. Winterbottom
Occidental Petroleum Corporation
200
300 (6)
GS, Cons Div (6)
GS, Cons Div, Br of Mining (9)
Gower Federal Service
Appeals List No. 1

4

Mining Claims: Assessment Work 3420

A protest is properly dismissed as not alleging facts which would warrant denying a petition for temporary deferment of annual assessment work on certain mining claims pursuant to the act of June 21, 1949, where the protest against the petition is a device seeking to have the Department consider and resolve the conflicting claims of the petitioner and the protestant to the possessory title of the mining claims; the Department cannot determine the right to possession as between opposing mineral claimants, such a controversy being properly heard in the courts.

Lin C. Mayberry, S 2165 **(November 4, 1969)**

In reply refer to:
142
S 2165

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

November 4, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Lin C. Mayberry	:	Associated Placer Claim, Moore Creek Nos. 1 thru 8, inc., Bluetail Nos. 1, 2 and 3, Redtail No. 1, 1/ and Green Tail Nos. 1 and 2 mining claims located in secs. 6 and 7, T. 7 N., R. 16 E., M.D.M., California, within the Stanislaus National Forest.

Decision Affirmed

Miss Lin C. Mayberry has appealed from a decision of the Sacramento land office dated April 30, 1969, which dismissed the appellant's protest against the petition of Mr. Lawrence E. Damon for the granting of a temporary deferment of the required annual assessment work on each of the above-identified mining claims for the assessment year beginning on September 1, 1967, and ending on August 31, 1968, pursuant to the act of June 21, 1949, 30 U.S.C. § 28b *et seq.* (1964) and implementing regulations in 43 CFR Subpart 3421. The protest was denied for the reason that a denial of the petition for temporary deferment would not resolve the dispute between the parties alleged in the protest, and the Department does not have jurisdiction to litigate the dispute between the parties. The decision appealed from also approved the petition of Mr. Damon for a temporary deferment of assessment work for the period from September 1, 1967, until and including August 31, 1968.

Section 1 of the act of June 21, 1949, 30 U.S.C. § 28b (1964), provides in pertinent part:

---

[1] Mr. Damon's petition and Miss Mayberry's protest both list two Bluetail No. 2 locations and two Redtail No. 1 locations. Mr. Damon has submitted a rough sketch map of the claims which shows only one Bluetail No. 2 mining claim and one Redtail No. 1 claim. This appears to establish that there is only one Bluetail No. 2 claim and one Redtail No. 1 claim in issue.

> The performance of not less than $100 worth of labor or the making of improvements aggregating such amount, which labor or improvements are required under the provisions of section 28 of this title to be made during each year, may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims * * * is in litigation * * * or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims * * *.

Mr. Damon's petition for temporary deferment of annual assessment work on the claims pursuant to the above-quoted act alleges that Miss Mayberry and one George Toop claim possessory title to the subject mining claims in derogation of the interest in the lands asserted by the petitioner; that Miss Mayberry and Mr. Toop are in physical possession of the lands and have refused entrance upon the lands to Mr. Damon and have made it impossible for him to enter upon the lands to do the required annual assessment work; and that Mr. Damon will, as soon as possible, initiate legal action in a State court to quiet possessory title to the lands in himself. Miss Mayberry shows that during the summer of 1967 and again on February 25, 1968, she ordered Mr. Damon's attorney off of the property, had a sheriff intervene to prevent Mr. Damon's representative from entering upon the lands, and published notice warning Mr. Damon that he would be charged with trespass under the criminal code if he entered upon the lands.

Miss Mayberry seeks to have the Department determine the conflicting claims to the possessory title to the lands asserted by herself and Mr. Damon. Controversies between adverse claimants which relate solely to the right of possession of mining claims are committed to the courts. See The Clipper Mining Co. v. The Eli Mining and Land Company et al. (On Review), 34 L.D. 401, 404 (1906). The Department explained in that decision (page 403) that the question of the right to possession as between contending mineral claimants is of judicial cognizance, and the award of that right by a court of competent jurisdiction will be binding upon the Department; however, the decision of the court will not establish the right to possession as against the United States, since the Government is not a party to the local court proceeding. That it is the intent of Congress that local courts and not the Department have jurisdiction of such controversies between adverse claimants for the possessory right to mining claims is buttressed by the provisions of 30 U.S.C. §§ 30 and 53 (1964) of the mining laws.

The granting or disallowing of the petition for a temporary deferment from annual assessment work could not be construed as a determination that one of the claimants has, or does not have, a right to possession as against the other party, since, as explained heretofore, the Department does not have jurisdiction to resolve the conflicting claims to possessory title as between the parties. See 43 CFR 3420.4 of the departmental regulations. Consequently, the land office properly refused Miss Mayberry's suggestion

that a determination be made that she had the right of possession to the mining claims and that Mr. Damon had no interest in the claims. Both parties have stated an intention to resolve their conflicting claims to possession of the lands in the local courts, and that is the proper procedure to follow in the event either of them does intend to assert a right to possession in exclusion of the other.

Furthermore, assessment work is required only to preserve the exclusive right to possession of a valid minerallocation upon which discovery has been made as against possible relocators. Wilbur v. United States ex rel. Krushnic, 280 U.S. 103, 104 (1930); Ickes v. Virginia Colorado Development Corp., 295 U.S. 639 (1935); 43 CFR 3420.3 While a claim is in the forcible adverse possession of another, the person adversely holding cannot complain of the non-performance of assessment work by the claim owner. Madison v. Octave Oil Co., 99 Pac. 176 (Cal. 1908). Therefore, applying these principles, in the event that Miss Mayberry should be able to establish in an appropriate court that she has the possessory title to the claims in issue, Mr. Damon will have gained nothing by reason of the postponement of the requirements that he do annual assessment work for the year in issue to protect himself against possible relocators, and Miss Mayberry will have lost nothing by reason of the approval of his petition for a temporary deferment of annual assessment work.

Miss Mayberry contends that the petition should be denied because there is no litigation pending in a court between the parties. Mr. Damon did not assert that there was litigation then pending; 2/ he sought the postponement of assessment work on the basis of a showing that a legal impediment existed which affected his right to enter upon the surface of the claims to do the required assessment work. Miss Mayberry denies in her protest and appeal that there was a legal impediment to prevent Mr. Damon from performing his assessment work, but the facts alleged in the protest and appeal, heretofore summarized, clearly show that she has prevented him from entering upon the lands. The land office properly held that there is an adequate showing of a legal impediment which prevents Mr. Damon from entering upon the surface of the mining claims to do the required assessment work.

2/ It is true that Mr. Damon's petition alleged that litigation involving the property had in the past made it impossible for him to perform the required assessment work, but this allegation did not infer that such litigation was then pending--this is established by the later statement in the petition asserting that the petitioner intends as soon as possible to file "a new law suit in Calaveras County quieting title to the subject property" in his name. The previous litigation referred to in Mr. Damon's petition, a court proceeding also referred to by Miss Mayberry, is a quiet title action in which judgment issued without establishing who holds the superior right to possession of the mining claims in issue.

On appeal Miss Mayberry seeks the denial of the petition for deferment because, instead of submitting the location dates of each mining claim in issue, the petition alleged the name of the claim and the date, volume and page number where such location notice can be found recorded in the office of the County Recorder of Calaveras County, California. Mr. Damon also submitted a letter stating the year when the claims were located, and stating that his recollection is that the recording dates are "almost simultaneously with the notice of location and discovery work being completed." He alleged that he was too ill at that time to do the research work necessary in the county recorder's office to obtain the actual location dates. The decision appealed from held that Mr. Damon had offered sufficient information to substantially meet the requirements of 43 CFR 3421.2(a) of the regulations and the purpose it contemplates. 43 CFR 3421.2(a) provides:

> In order to obtain temporary deferment, the claimant must file with the manager of the land office for the district in which the lands are situated, a petition in duplicate requesting such deferment. No particular form of petition is required, but the applicant must attach to one copy thereof a copy of the notice to the public required by the act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded. The petition and duplicate should be signed by at least one of the owners of each of the locations involved, shall give the names of the claims, dates of location, and the date of the beginning of the one-year period for which deferment is requested. Each petition shall be accompanied by a $10 nonrefundable service charge.

Mr. Damon's petition incorporated by reference the notices of location recorded in the County Recorder's office by showing the date of recordation, the volume and page where the document can be found, and the name of each mining claim. We agree with the land office decision that, in the circumstances, such incorporation of the recorded notices of location by reference was compliance with that part of the quoted regulation requiring the petitioner to give the dates of location of the mining claims.

Next, on appeal Miss Mayberry points out that Mr. Damon's petition for temporary deferment from annual assessment work for the period ending on August 31, 1968, was recorded in the office of the County Recorder on August 30, 1968, and the petition was filed with the land office on September 3, 1968, but the $10 service charge was not paid by Mr. Damon to the land office until October 21, 1968. Miss Mayberry is of the opinion that the petition should be denied for failure to comply with that part of the quoted regulation requiring that each petition shall be accompanied by a $10 nonrefundable service charge.

Until the service charge was paid, the land office had no authority to consider the petition. However, Mr. Damon's petition need not be dismissed for failure to send the petition and the service charge to the land office at the same time, because, at the time payment was received, the land office had not closed the case for failure to comply with the quoted regulation. In the event that no service charge had been paid, the land office would have been required to refuse to consider the petition, and the case would have been closed. Mr. Damon did comply with the regulation by paying the service charge on October 21, 1968, and his petition has the legal effect of having been filed on that day. When Mr. Damon had complied with the provisions of the law and regulations it was then appropriate for the land office to consider his petition.

Unlike certain other acts deferring annual assessment work, section 4 of the act of June 21, 1949, 30 U.S.C. § 28e (1964), does not provide a time for seeking the deferment of such work, but leaves it to the time of recordation of the notice of intent to file a petition under the act, and the recordation of the decision disposing of the petition, for the court's guidance in determining the superior right of possession as between a petitioner-mining claimant and any rival relocator for the land. As stated previously, the resolution of such conflicts concerning the possessory right to land is not within the jurisdiction of the Department. The Secretary of the Interior, and his delegates, only have the responsibility to determine whether the law and regulations have been complied with in order that the petition can be considered, and whether there has been a sufficient showing that one or more of the unavoidable contingencies enumerated in the act in relation to the mining claims exist, and then to grant or deny the deferment. Since Mr. Damon did finally comply with the regulations and did make an adequate showing that there was a legal impediment to his entering upon the surface of the mining claims in issue to do the required assessment work during the year in issue, the protest was properly dismissed and the performance of assessment work was properly postponed for the year beginning on September 1, 1967, and ending August 31, 1968. Accordingly, the decision appealed from is affirmed.

Miss Lin C. Mayberry has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal includes all of the mining claims in issue the filing fee will be $75. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

If an appeal is taken by Miss Mayberry, the attorney for the adverse party who must be served is:

Mr. Arthur L. Damon, Jr.
Attorney at Law
624 University Avenue
Palo Alto, California 94301

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Mr. Arthur L. Damon, Jr., Attorney for Petitioner, Lawrence E. Damon
Mr. Lawrence E. Damon
Regional Forester (California Region), Forest Service, U.S.D.A.
300 (6)
200
Appeals List No. 1
Gower Federal Service

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1969 DEC 5 AM 10 00

In Reply Refer to:
142
R 31
34
35

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

November 25, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

William R. White :
Mauritz J. Kallerud :
Howard J. Winterbottom : Sodium
Occidental Petroleum Corporation :
American Potash & Chemical :
Corporation :

In Re Protest

American Potash & Chemical Corporation has filed a protest against the Bureau decision, William R. White et al., R 31 etc. (October 16, 1969), which authorized the issuance of preference right sodium leases R 31, R 34, and R 35, and the approval of pending assignments relating thereto. On November 14, American filed a notice of appeal from the White decision to the Secretary of the Interior, and paid filing fees in the amount of $30. Proof of service of the notice of appeal upon the adverse parties was subsequently filed by American. Also on November 14, American filed a telegram requesting reopening of the issues in the Bureau decision and a stay of proceedings on the preference right sodium lease applications to afford American an opportunity to be heard on the protest and the appeal. A statement of reasons in support of the appeal was received from American on November 24. In substance, American contends that it is an intervening adverse party as an applicant for sodium prospecting permits on the lands concerned.

Since American was not named as an adverse party in the Bureau's decision of October 16, 1969, supra, it would have no right of appeal from that decision. However, the protest against the decision will be considered by this office, and action will be taken thereon as is deemed appropriate. 43 CFR 1852.1-2.

Accordingly, American Potash & Chemical Corporation is hereby directed to serve a copy of its protest upon Lewis E. Hoffman, attorney for Messrs. White, Kallerud and Winterbottom, at Suite 717, 711 Fourteenth Street, N.W., Washington, D.C. 20005, and upon O'Melveny & Myers, attorneys for Occidental

Petroleum Corporation, at 611 West Sixth Street, Los Angeles, California 90017, within 30 days from receipt hereof, in the manner provided in 43 CFR 1840.0-6(e), and to file proof of such service in this office within 15 days thereafter. Within the same time, American may request that the showing submitted in support of its "appeal" be considered as a showing in support of its protest.

Messrs. White, Kallerud and Winterbottom, and Occidental Petroleum Corporation are allowed 30 days from receipt of a copy of the protest by American within which to file any response any of them wishes to have considered in the matter. A copy of any such response must be filed in this office and be served upon American Potash & Chemical Corporation, Kerr-McGee Building, Oklahoma City, Oklahoma 73102, in the manner provided in 43 CFR 1840.0-6(e), and proof of such service must be filed in this office within 15 days thereafter.

Failure of American to comply herewith will result in dismissal of its protest without further notice.

The filing fees submitted with the purported appeal of American will be returned to it by Treasury check in due course.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

DISTRIBUTION

American Potash & Chemical Corporation (Certified Mail) (Oklahoma City)
American Potash & Chemical Corporation (Los Angeles)
Lonergan, Jordan & Gresham
Lewis E. Hoffman, Attorney for White, Kallerud, Winterbottom
O'Melveny & Myers, Attorneys for Occidental
Occidental Petroleum Corporation
William R. White
Howard J. Winterbottom
Mauritz J. Kallerud
SD, California
D&LO, Riverside
Each Case
Ap & He R.F.
DDRF

appeal to Sec. A.31247

Multiple Mineral Development: Common Varieties of Minerals 3511

Where the deposits of rock in issue have no economic advantage over similar suitable attractive rock commonly available in sufficient quantities to adequately supply the market demands, it is not enough to remove the rock in issue from the common varieties category merely to show that the rock in issue sells for a higher price than rock used for the same purpose that is less attractively colored.

United States v. R. W. Brubaker et al., Riverside Contest No. 02776 etc.
(December 9, 1969)

In reply refer to:
142
Riverside Contest Nos.
02776
02777
02778

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 9, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. R. W. Brubaker a/k/a Ronald W. Brubaker, B. A. Brubaker a/k/a Barbara A. Brubaker, and William J. Mann a/k/a W. J. Mann, Contestees-Appellants	:	Nebocher placer mining claim located in sec. 12, T. 9 N., R. 1 W.; Near Pink placer claim located in sec. 28, T. 10 N., R. 1 W.; Orchid Slope No. 1 placer claim located in sec. 8, T. 9 N., R. 1 E.; and Calico Shores placer claim located in sec. 30, T. 10 N., R. 1 E., S.B.M., California.

Decision Affirmed

The above-named appellants have appealed from the Hearing Examiner's decision dated September 11, 1969, which determined that the above-identified mining claims are null and void for lack of a discovery of a locatable mineral pursuant to the provisions of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), within the boundaries of any of the claims.

The mining claims in issue were located for a colored volcanic rock after the enactment of section 3 of the act of July 23, 1955, supra, which provides, in pertinent part:

> No deposit of common varieties of sand, stone, gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * * . "Common varieties" as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * * .

A hearing was held before a Hearing Examiner on November 21, 1963. By a decision, A-30636 (July 24, 1968), in these proceedings, the Department set aside the Bureau's decisions then under consideration. The departmental decision noted that the crucial issue is whether or not the evidence preponderates that the stone does have physical and chemical properties giving it a distinct economic value

within the meaning of the quoted act. The Department pointed out that in determining whether a deposit has a distinct and special value there must necessarily be a comparision of the deposit with other deposits of similar type minerals. The decision noted that there was no evidence that the material within the claims has some property making it useful for some purpose for which other commonly available materials cannot be used. The decision then defined the criteria for determining whether such a deposit of stone is a common or uncommon variety by stating that if the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing not merely that the material is marketable, but that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a significantly higher price in the market place. Then the departmental decision remanded the contest proceedings, holding:

> The present record does not contain sufficiently detailed information upon which a comparison may be made of the economic value of the rocks within these claims with other stone used for the same purposes. The general statements of the witnesses at the hearing as to the economic value of the rocks were not supported by evidence showing differences in market prices between these rocks and other materials being used for the same purposes. Therefore, a further hearing in this case is needed to receive evidence on this issue of the comparative market place value of this stone with other materials used for the same purposes before a final decision can be made as to whether the deposits of stone within these claims are of an uncommon variety as defined under the act and the standard discussed above.

Consequently, a further hearing was held before a Hearing Examiner on December 5, 1968.

The appellants object in their present appeal to the Hearing Examiner's finding at page 7 of the decision appealed from that they "did not establish that their deposits have a distinct and special value over and above many other deposits having the same characteristics and useable for the same purposes." (Emphasis supplied by the appellants.) From a reading of the Hearing Examiner's entire decision it is clear that he meant that the mining claimants did not establish that their deposits have a distinct and special value over other deposits in common supply in the same market area having the same characteristics and useable for the same purposes. The appellants assert that the Hearing Examiner failed to apply the facts adduced at both hearings to the criteria defined in the Brubaker departmental decision, supra, for determining whether such deposits of stone come within the category of common varieties of stone pursuant to the quoted act.

The evidence adduced at both hearings shows that:

Witnesses for both parties at the earlier hearing stated that the material in issue was used for "roofing granules" (1963 Hr. Tr. 11-12, 39, 73, 117). At the subsequent hearing Mr. Brubaker and one of the contestees' witnesses explained that in their opinion "roofing granules" were used in the manufacture of asphalt shingles and rolled goods, and the material on the mining claims in issue was too large to be suitable for such use (1968 Hr. Tr. 52-53, 79-80, 96). This question of semantics is not significant in these proceedings since the

witnesses at both hearings agreed that the crucial use of the colored volcanic rocks on the mining claims is in the build-up roofing industry--two layers of saturated felt are generally laid down and covered with hot asphalt, then colored roofing rock is thrown on top to give the roof color and protect the underlayers from the rays of the sun (1963 Hr. Tr. 13; 1968 Hr. Tr. 79, 123). We shall follow the practice of the Hearing Examiner at the later hearing and refer to the material in issue as being used primarily for "roofing rock," since that appears to be the term used in the build-up roofing industry.

From the evidence, it is clear that although most rock is not suitable for roofing rock purposes (1963 Hr. Tr. 92), there are widespread deposits of different rocks that are practical for such purposes (1963 Hr. Tr. 43; 1968 Hr. Tr. 83, 118). Mr. Brubaker testified that he has had to do considerable exploring to find sources of such rock that is attractive, but he did testify concerning eighteen quarries in the Barstow area in which suitable colored roofing rock is produced (1963 Hr. Tr. 64; Exh. B). The mining claimants' consulting geologist testified that, in his opinion, the colors of the rock in issue made it unique, otherwise he agreed it would be a common rock (1963 Hr. Tr. 132, 135). A wholesale building material dealer also agreed that colors alone bring the higher price (1968 Hr. Tr. 120).

The mining claimants have several sources from which to supply the roofing rock they sell. The company quarries some of the rock on a royalty basis, they have acquired some lands as a source of supply, and they have located placer claims in the area for such rock (1963 Hr. Tr. 58). The company sells ten colors of roofing rock (1963 Hr. Tr. 60, 90). The rock on the claims in issue is colored gold, pink, lilac and beige, each claim having a different colored rock (1963 Hr. Tr. 60). To avoid possible trespass charges, the company is not quarrying rock from the Nebocher, Orchid Slope No. 1 and Near Pink claims; they are able to supply most of the colors found on these claims from lands they have purchased (1968 Hr. Tr. 71).

During the hearing held in 1968, Mr. Brubaker showed that there is a market of from 3,000 to 4,000 tons of colored roofing rock a month in the area (Tr. 107-108), that his company sells approximately 1,500 tons of the material a month (Tr. 53, 70), and that his two major competitors produce most of the rest of the rock for the local market (Tr. 62, 116, 119). Brubaker-Mann's two major competitors produce roofing rock from similar materials to that sold by the contestees, and they all sell it for approximately the same price (Tr. 22, 28, 63-64, 102, 119-120). In other words, stone of the same general characteristics is sold for approximately the same price by those in the industry (Tr. 108, 119-120). Red and green colored roofing rock sells for $13 a ton, but there is no such rock on any of the claims in issue (Tr. 55). The pink colored stone on one of the claims in issue has at present a low market demand (Tr. 72). The evidence shows that the mining claimants, and their competitors, sell the type of stones on the claims in issue at the mill at a price of approximately $12 a ton (Tr. 28, 54-55, 87, 109). There was no explicit testimony concerning the expenses of the mining claimants' competitors,

except that one active producer has an appreciable freight advantage over Brubaker-Mann quarries (Tr. 62). Mr. Brubaker showed that he produces the rock at a cost of approximately $10 a ton (Tr. 54-55). There are several other materials used for the same purposes as natural colored roofing rock, and the testimony of the mining claimants' witnesses was not in accord as to the comparative advantages of one material over another. Mr. Brubaker was of the opinion that colors must not fade (1963 Hr. Tr. 62), while one of his witnesses stated that it was not important if some fading occurred. A stone dealer testifying for the mining claimants stated that he only used colored stone if the roof could be seen, otherwise local gravel or other less expensive rocks were used (Tr. 124-125). The market for natural colored roofing rock goes up and down, but has been good for the last 20 years (Tr. 114); however, the industry is able to supply the market demand.

A summary of the evidence shows: (1) There are many rocks and other materials used for the same purpose as the rock in issue; (2) the rock in issue sells for no higher price than other attractive stones offered in the market for the same purpose by the contestees and their competitors; (3) there is a sufficient supply of attractive rock of suitable quality from many different deposits in the area so that those in the industry have been able to adequately supply the market demands; 1/ and (4) no economic advantage in producing the stone has been asserted over that of similar competing stones in the area. In response to the decision of the United States Court of Appeals for the Ninth Circuit, McClarty v. Secretary of Interior, 408 F. 2d 907 (1969), the Department in United States v. Kenneth McClarty, 76 I.D. 193 (1969), explained that stone used for the same purposes as more common stone must show a significant economic advantage because of a unique property to come within the category of an uncommon variety of stone. Thus, the Department in its latest McClarty decision, supra, somewhat developed its explanation, set forth in the departmental Brubaker decision, supra, and stressed in the appellants' statement in support of their appeal, of the criteria for determining whether deposits of rock are an uncommon variety. The appellants have not shown that the Hearing Examiner was in error in finding that the stone in issue is a common variety of stone under the quoted act and the standards discussed heretofore. Taking the criteria into consideration mentioned in the latest McClarty decision, supra, it is not enough that the rock in issue sells for a higher price than rock used for the same purpose that is less attractively colored, where there is no showing that the deposits in issue have any economic advantage over other suitable, attractive rock in the area which is commonly available in sufficient

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1/ In this connection we note the readiness with which the mining claimants obtained suitable rock of most of the colors found on the claims in issue from other sources when these adverse proceedings were initiated.

quantities to adequately supply the market demands. The contestees were required to offer a preponderance of the evidence to overcome the Government's prima facie showing that the material in issue is a common variety of rock, and the contestees have failed to make the necessary showing. The stone in issue is a common variety of stone, and common varieties of stone were not locatable under the mining laws at the times the mining claims in issue were located, nor are such materials now locatable.

Accordingly, the Hearing Examiner's decision determining that the Nebocher, Near Pink, Orchid Slope No. 1, and Calico Shores mining claims are null and void is affirmed.

The above-named appellants have the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the attorney for the adverse party who must be served is:

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Los Angeles, California.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Regional Solicitor (Los Angeles), U.S. Department of the Interior
Mr. Ronald W. and Mrs. Barbara A. Brubaker
Mr. William J. Mann
300 (6)
200
Gower Federal Service
Appeals List No. 1

appeal to Sec A-31 246

Mining Claims: Discovery 3413

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a lode or vein bearing mineral of such quality and in such quantity as to warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is exposed mineralization which merely gives rise to a hope or expectation that a valuable mineral deposit may be found upon further exploration.

The Government is not obligated to prove affirmatively in a mining contest either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made, and the Government's mineral examiners are under no obligation either to rehabilitate discovery points or to explore beyond the current workings of a mining claimant in attempting to verify a claimed discovery; where a Government mineral examiner testifies that he has sampled the exposed workings on a claim without finding significant mineral values and that he observed no other mineralization to sample, a prima face case of no discovery has been made, and the burden is thereafter upon the mining claimant to show by a preponderance of the evidence that a discovery has been made.

United States v. Hines Gilbert Gold Mines Company, Contest S-1254-B **(December 9, 1969)**

In Reply Refer to:
142
Contest S-1254-B

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

December 9, 1969

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant	:	Involving Middle Fork Quartz (also known as Middle Fork Lode), Buckeye Quartz, Rocky Chucky Quartz, and Gilbert Quartz lode mining claims, situate in W½ section 24, E½SE¼ section 23, T. 13 N., R. 9 E., M.D.M., within Placer and El Dorado Counties, California.
v.	:	
Hines Gilbert Gold Mines Company, Contestee	:	

Decision Affirmed

The Hines Gilbert Gold Mines Company has appealed from a Hearing Examiner's decision dated January 13, 1969, which held the Middle Fork Quartz (also known as Middle Fork Lode), Buckeye Quartz, Rocky Chucky Quartz, and Gilbert Quartz lode mining claims null and void for lack of a discovery of a valuable mineral deposit within the limits of any of the claims.

Following examination of the claims in connection with the Auburn Dam Project, a contest was inititated at the request of the State Director, Bureau of Land Management. A complaint was filed January 29, 1968, charging that (a) the lands embraced within the boundaries of the claims are nonmineral in character, and (b) existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claims identified as Middle Fork Quartz (sometimes designated as Middle Fork Lode), Buckeye Chucky Quartz, Rocky Chucky Quartz, and Gilbert Quartz lode mining claims. 1/ A timely answer denying the allegations was filed, and a hearing was held on May 29, 1968, at Sacramento, California. The contestant was represented by E. Kendall Clarke, Office of the Solicitor, U.S. Department of the Interior, Sacramento; the contestee was represented by Wallace T. Hyde, Attorney at Law, Sacramento.

The record discloses that the Middle Fork Quartz claim was located August 21, 1911, amended September 5, 1911, and relocated as the Middle

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1/ The complaint was amended at the hearing to include the Buckeye Quartz lode mining claim, in lieu of the Buckeye Chucky Quartz lode mining claim.

Fork Lode claim on May 12, 1955; the Buckeye Quartz claim was located May 18, 1920; the Rocky Chucky Quartz and the Gilbert Quartz claims were located May 20, 1920. The claims were located for gold and other minerals. They are within the W½ section 24, T. 13 N., R. 9 E., M.D.M., California, although the Buckeye claim extends into the E½SE¼ section 23.

After admitting that no mineral has ever been produced from the contested claims, but asserting this fact has no relevancy to the question of discovery, the appellant made the following contentions: (1) that the Hearing Examiner's statement that no gold-bearing veins are exposed within the limits of the claims is not relevant to the question of whether there is discovery, as the Mariposa and Greenstone formations present on the claims are known to contain gold; (2) that the samples taken by the Government exminer show values for both gold and silver; (3) that there is no requirement in the law that commercial ore be exposed within an unpatented mining claim; (4) that the Government did not make a prima facie case of no discovery; (5) that Sharp, the Government examiner, should have examined the claims as if he were looking for mineral, as a private engineer would have searched; (6) that the notices of location prove earlier discovery of minerals, and that a discovery once made will suffice for all time; (7) that geologic inference should be permitted, interpolating data from producing mines in the vicinity to bolster the allegation of discovery; (8) that constitutional rights were abridged by not being allowed to cross-examine the Government's expert on the amount of values necessary to support a discovery; and (9) that the evidence presented warrants further development of the claims within the prudent man rule by open pit operations of both the contiguous patented and the unpatented claims as a unit. The appellant cited Snyder v. Udall, 267 F. Supp. 110; Garula v. Udall, 268 F. Supp. 910; and Henault Mining Company v. Tysk, 271 F. Supp. 474, in support of its arguments that a discovery of valuable mineral deposits had been made within the claims.

The Government's answer to the appeal states that Snyder and Garula, supra, were summarily overruled following United States v. Coleman, 390 U.S. 599 (1968), and defends the hearing examiner by asserting that there is no mineral in the claims to be sampled. The answer further adverts to Foster v. Seaton, 271 F. 2d 836 (1959), relating to the burden of proof in a mining contest, and states that the rule of discovery announced in Castle v. Womble, 19 L.D. 455 (1894), was approved in Coleman, supra, with the requirement of marketability being considered to be an implicit element by Coleman and in Converse v. Udall, 399 F. 2d 616 (9 Cir. 1968), cert. denied, 89 S. Ct. 635 (January 13, 1969).

Bearing in mind the contentions of the appellant, we have reviewed the record assembled at the hearing and set forth the pertinent facts adduced in the testimony and evidence.

At the hearing Alan A. Sharp, a mining engineer employed by the Bureau of Land Managment and duly qualified as an expert witness, testified that he had examined the Buckeye, Rocky Chucky and Gilbert claims on seven occasions between August 1, 1967, and May 20, 1968, being accompanied by Ralph Huckaby, president of the Hines Gilbert Gold Mines Company, on three different trips, and that he had examined the Middle Fork claim on three occasions within the same period of time, being accompanied by Huckaby once. He described the claims generally as lying south of the Middle Fork of the American River, although most of the Middle Fork claim is north of the river. The topography is steep, rising from the river. The vegetation is brushy, with few trees. The principal rock formations present on the surface are Mariposa Slate, Greenstone, Serpentine, and alluvial landslide materials. He testified that he would not have taken any samples because he saw no evidence of significant mineralization, neither vein, lode, seam, nor faulting, but at the request of Huckaby, and in his presence, he did take a total of sixteen samples from all four claims, and in the places indicated by Huckaby. The samples were assayed by Morse Laboratories, Sacramento, whose certificates (Exh. 5, 6 and 7) show values from nil to $2.10 per ton for gold, and approximately a half ounce of silver per ton. On cross-examination, he reiterated that the places samples were lacking in mineral character but the samples were requested by the claimant, although, in his opinion, there were no places really worth sampling within the limits of any of the claims. He admitted that the Mariposa formation is the prime gold carrier in the Mother Lode Country of California. He stated that he had not gone underground on any of the contiguous patented claims and was unaware if any of the underground workings in them did invade the unpatented claims. He asserted that he had found no valuable mineralization on any of the claims, and that, in his opinion, the low values of gold and silver reported from the assays did not constitute a discovery of a valuable mineral deposit.

Ralph Huckaby, president of the Hines Gilbert Gold Mines Company, testified that he was a layman, not trained in geology or mineralogy. He asserted that the original discovery had been made on the Middle Fork claim in 1911, when it was first located. The Middle Fork claim has been surveyed (M.S. 5489 California). He recited production from contiguous patented claims and asserted that more than $10,000 had been spent on the development of the four unpatented claims here under contest. He hoped that an open pit operation, embracing the patented claims and the four unpatented claims, could be undertaken in the near future, although the impending Auburn Dam project imperiled the acquisition of new capital for such a venture. He stated that he had engaged M. D. Rombough, a mining engineer, to assist him in preparing for the hearing, but that he had since terminated this employment, so he requested additional time to have another mining engineer present evidence in support of his position. He asserted that he had now employed Denton W. Carlson,

a consulting geologist, but that other commitments precluded Carlson from testifying at the hearing. Huckaby also submitted copies of letters from various mining engineers relating to their studies of the Hines Gilbert mining properties in the past, but none of the reports relate to the claims under contest. Huckaby voiced his opinion that the veins in the patented claims extend into the unpatented claims, and that the evidence of gold shown in the unpatented claims was adequate to constitute a discovery of valuable minerals on each claim. He admitted that he did not know why no mineral had ever been taken from the subject claims under contest.

After the hearing, pursuant to a ruling by the Hearing Examiner, Denton W. Carlson, a consulting geologist employed by the contestee, submitted a report in which he discussed generally the geology of the area surrounding the claims, essentially conforming with the testimony given at the hearing by Sharp, the contestant's witness. He also discussed the former production of gold from the neighboring patented claims, as well as from other mines in the vicinity, inferring that profitable mineral values should occur within the contested claims. He reported his ore samples from the contested claims were assayed by Morse Laboratories, and showed gold values ranging from $0.46 to $4.30 per ton. He thought that these values were adequate to constitute discovery under the mining laws, but he indicated that further exploration should be done before undertaking any extensive development of the claims. From this evidence and testimony in the record, the Hearing Examiner found that no valid discovery of a valuable mineral deposit exists within the limits of any of the four contested claims. After careful consideration of the entire record, including the presentations and arguments on appeal, we conclude that the decision of the Hearing Examiner is correct.

The establishment of a valid lode mining claim is contingent upon the "discovery" of "veins or lodes" containing "valuable /mineral/ deposits" within the limits of the claim. 30 U.S.C. §§ 22, 23, (1964). Under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain possession against all, except the Government, while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain possession. United States v. Everett Foster et al., 65 I.D. 1 (1958), affirmed in Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

When the Government contests a mining claim on public lands, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the mining claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, supra.

The legal requirement for maintaining a mining claim must be fulfilled by the claimant making a discovery of a valuable mineral deposit whose existence is in such condition that the Government may confirm it by an examination. See Henrikson et al., v. Udall et al., 229 F. Supp. 510 (D.C. N.D. Cal. 1964), affirmed 350 F. 2d 949 (9 Cir. 1965), rehearing denied October 28, 1965, cert. denied, 380 U.S. 940 (1966). The dispute in this case centers on the meaning of the concept of discovery under the mining laws and on the sufficiency of the evidence of discovery of a valuable mineral deposit. The parties agree that discovery of a valuable mineral deposit is essential for a valid mining claim. It is obvious, however, that the contestee has a different concept of "discovery" from that used by the Hearing Examiner.

In determining if there has been a discovery of a valuable mineral deposit the Department has consistently adhered to the "prudent man rule" first declared in Castle v. Womble, supra, that in order to constitute a discovery on a lode claim there must be physically exposed within the limits of the claim a lode or vein bearing mineral of such quality and in such quantity as to warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, and that it is not sufficient that the exposed mineralization merely give rise to a hope or expectation that, upon further exploration, a valuable mineral deposit may be found. See e.g., United States v. Bryan Gould, A-30990 (May 7, 1969); United States v. Evelyn M. Kiggins et al., A-30827 (July 12, 1968); Marvel Mining Company v. Sinclair Oil & Gas Company, et al., 75 I.D. 407 (1968); United States v. Adam J. Flurry, A-30887 (March 5, 1968); United States v. Lucille Lundy, A-30724 (June 30, 1967). This rule has been cited with judicial approval on many occasions, e.g., Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, supra.

A further time-honored test to be applied in determining whether a discovery has been made in a lode mining claim is that set forth in Jefferson Montana Copper Mines Company, 41 L.D. 320 (1912): (1) there must be a vein or lode of quartz or other rock in place; (2) the quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. It is clear that many factors may enter into the third element; the size of the vein, as far as disclosed, the quality and quantity of the mineral that it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success and other like factors, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

Within the concept of the "prudent man rule" also necessarily is profitable marketability of the mineral deposit. As the Supreme Court stated in Coleman, supra:

> Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. (footnote omitted) The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used * * * merely recognizes this fact. 390 U.S. at 602, 603.

The Department recognizes a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Ford M. Converse, 72 I.D. 141 (1965), affirmed in Converse v. Udall, supra; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

When the Government contests a mining claim on public land it undertakes to show that the discernible evidence of mineralization on the claim is insufficient to constitute a discovery. The Government is not obligated to provide affirmative proof that the land within the mining claim is nonmineral or that no discovery has been made. The function of the Government is one of investigation for purposes of verifying, if possible, the claimed discovery. If the Government's examiner testifies that he examined the mining claim and found no workings or evidence of valuable mineral deposits, the Government has established a prima facie case. United States v. Bryan Gould, supra; United States v. Lawrence W. Stevens, 76 I.D. 56 (1969); United States v. Frank Coston, A-30835 (February 23, 1968). It is the duty of the mining claimant to keep discovery points available for inspection by the Government's mineral examiner and the examiner has no duty to rehabilitate discovery points or to explore beyond the current workings of the mining claimant. United States v. Bryan Gould, supra.

What is the evidence supporting the Government's prima facie case? The testimony by Sharp, qualified as an expert witness, essentially was that he saw no evidence of significant mineralization within any of the claims—neither vein, lode, seam or faulting--but that he had sampled as requested by Huckaby. The assays of the samples showed values of from nil to only $2.10 for gold and approximately a half ounce of silver per ton of ore.

Sharp testified that the values reported in the assay certificates were too low to constitute a discovery of a valuable mineral deposit. This is sufficient to establish a prima facie case of no discovery, and to shift the burden to the mining claimant to demonstrate a discovery of a valuable mineral deposit within the limits of each contested claim.

How has the contestee endeavored to overcome this prima facie case? Huckaby admitted that no mineral had ever been taken from the contested claims and suggested, without substantiation, that the gold-producing veins on the adjacent patented claims extend into the contested claims. He did not point out any significant mineralization within the limits of the contested claims nor indicate, other than by inference, the presence of valuable gold-bearing formations within the limits of the claims. Carlson, a professional geologist, reported his sampling of the claims produced assay certificates showing gold values ranging from $0.46 to $3.40 per ton, and offered nothing factual as to the extent and quality of the mineralization on the claims. Furthermore, he recommended further exploration before attempting any development of the claims.

The values of gold actually shown in the claims were so slight as not to constitute a discovery of a valuable mineral deposit. The discovery required by the mining laws means more than a showing only of isolated bits of minerals not connected with or leading to substantial values. United States v. Emerald Empire Mining Company, A-30445 (December 3, 1965); United States v. John L. Cooper et al., A-30267 (May 11, 1967). The Department does recognize that a valuable mine need not be a profitable mine, but nevertheless the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result.

The contention that because the Mariposa and Greenstone formations are present on the claim, and because in other areas these formations are known to carry gold in large amounts, one may infer the presence of gold in the claims in sufficient quantity to constitute a discovery of a valuable mineral deposit, is not meritorious. Geologic inference may be relied upon to establish the extent and potential value of a particular mineral deposit, but it may not be relied upon, as a substitute for the actual finding of a mineral deposit, to establish the existence of the deposit within the limits of a designated mining claim; and where a vein carrying some erratic values in mineralization has been exposed within the limits of a mining claim but the exposed mineralization does not constitute a mineral deposit capable of development and the existence of such a deposit in the vein within the limits of the claim can only be inferred, a discovery, within the meaning of the mining laws, has not been shown, and the claim is properly declared invalid. United States v. George A. and Dorothy Relyea, A-30909 (June 25, 1968).

In this case the Hearing Examiner did not require that a showing of commercial ore be made to satisfy the statutory requirement of discovery. He stated merely that no evidence of valuable mineral deposits had been introduced, that is, a deposit which reasonably might be extracted at a profit under proper management.

We find that the Hearing Examiner applied the proper standards in evaluating the evidence, and we concur in his determination that the claimant failed to demonstrate a discovery of a valuable mineral deposit within the limits of the Middle Fork, Buckeye, Rocky Chucky and Gilbert quartz lode mining claims.

The decision appealed from is affirmed.

The Hines Gilbert Gold Mines Company has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all four mining claims adversely affected by this decision, the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error. In taking an appeal, the adverse party to be served is Regional Solicitor, U. S. Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Wallace T. Hyde, Attorney for Appellant (Certified Mail)
Regional Solicitor, USDI, Sacramento
Hines Gilbert Gold Mines Company
200
300 (6)
Gower Federal Service
Appeals List No. 1

appeal to Sec A-31254

Mining Claims: Contests (Answers to Complaints) 1852.1-6 and 1852.1-7

> Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is not filed within the 30-day period required by the pertinent regulations the allegations of the complaint will be taken as admitted by the contestees and the case will be decided without a hearing by the land office manager, and the Secretary is without authority to waive the rules to permit the late filing of an answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations.

United States v. Nelson E. Divine and Raymond E. Bryant, Sacramento Contest 078841 (January 16, 1970)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 JAN 30 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

In reply refer to:
142
Sacramento
Contest 078841

January 16, 1970

CERTIFIED MAIL
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DECISION

United States of America, Contestant	:	Involving the J and J placer mining claim located in sec. 13, T. 7 N., R. 7 E., H.M., California (within the Shasta-Trinity National Forest)
v.	:	
Nelson E. Divine and Raymond E. Bryant, Contestees	:	

Decision Affirmed
Mining Claim Declared Null and Void

Pursuant to a recommendation of the Forest Service, United States Department of Agriculture, which was based upon a mineral examination made by a Forest Service mineral examiner, the Sacramento, California, land office issued a complaint contesting the validity of the subject mining claim, the principal charge in the complaint being that "The existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claim." The "Notice" at the end of the complaint also contained a statement that unless contestees file an answer to the complaint in the Sacramento land office within 30 days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing.

Service of the complaint was had on the contestees on September 26 and October 19, 1964. By decision of November 23, 1964, the land office declared the claim null and void because of the failure of the contestees to file an answer to the complaint within the 30-day period allowed by the regulations, 43 CFR 1852.1-6, considering the failure to file as an admission of the truth of the charges.

On appeal to the Director of this Bureau by the contestees, this office, by decision dated January 18, 1965, summarily dismissed the appeal for the reason that the statement of reasons for the appeal was filed late, pursuant to 43 CFR 1840.0-7 and 1842.5-1. The dismissal was affirmed by the Department of the Interior on April 29, 1965, United States v. Nelson E. Divine and Raymond E. Bryant, A-30435.

In ensuing litigation involving the case, United States v. Nelson E. Bryant (Civil No. 9929), the United States District Court for the Eastern District of California remanded the case to the Department of the Interior for an exercise of discretion as to whether the administrative appeal should be dismissed or the late filing of the statement of reasons for appeal should be accepted. The case file was recently returned to this office by the Department, together with a memorandum stating that they had been advised by the Department of Justice that no appeal will be taken from the court's order, and that action may now be taken by this office in accordance with the order. Accordingly, our decision of January 18, 1965, summarily dismissing the appeal is vacated.

We have reviewed the entire case record on the merits, and conclude that, even though we excuse the late filing of the statement of reasons for appeal, the land office decision of November 23, 1964, is correct and we have no alternative but to affirm it.

The court based its remand order on Tagala v. Gorsuch, 411 F. 2d 589 (9th Cir. 1969), which held that the wording of 43 CFR §§ 1840.0-7 and 1842.5-1 which provide that failure to file a statement of reasons for appeal within 30 days of the taking of the appeal "will subject the appeal to summary dismissal" is not mandatory but calls for an exercise of discretion. Unlike the wording in these sections of the regulations pertaining to appeals procedures, the language in the pertinent sections of the Department's regulations pertaining to contest proceedings, with respect to the timely filing of answers to contest complaints, is clearly mandatory. The latter regulations state in 43 CFR 1852.1-6 that "Within 30 days after service of the complaint * * * the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *" and, in 43 CFR 1852.1-7(a), that "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." (Emphasis supplied). The wording in the latter quotation is essentially the same wording contained in the warning which appears in the Notice at the end of the contest complaint which was served on the contestees.

The Department has consistently held that the requirements of these regulations pertaining to timely filing of answers to contest complaints are mandatory, and that the Secretary is without authority to waive the rules to permit the late filing of an answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. Owen O. Roberts, A-30825 (November 3, 1967); United States v. Sheldon E. Evans, A-30923 (September 30, 1968); United States v. Curtis E. Holcomb et al., A-31019 (August 21, 1969), affirming Bureau decision United States v. Curtis Holcomb et al., Contest No. 079864 (Sacramento) (May 31, 1968).

All but one of the reasons advanced by the appellants in their statement of reasons for appeal are immaterial to the decisive issue of the case. They are arguments on the merits of their claim, which they are now precluded from raising as a matter of law. See United States v. Owen O. Roberts, supra. With respect to the decisive issue of the case, the appellants contend that Raymond E. Bryant took a copy of the complaint served on him to an attorney for the purpose of preparing an answer while the latter was employed in the office of a law firm, that shortly after that the said attorney left the office of the law firm understanding that the law firm was going to handle the answer to the complaint while the law firm understood that the said attorney was going to handle the answer, and that, as a result, no answer was filed in time. Although the situation is regrettable, it cannot be considered since the provisions of the regulations are mandatory and cannot be waived. In United States v. J. Hubert Smith, supra, the Department rejected a similar contention raised by the appellant to the effect that the failure to file his answer timely was due to inadvertence and oversight on the part of his attorney.

Accordingly, the land office decision of November 23, 1964, is hereby affirmed.

Raymond E. Bryant and Nelson E. Divine have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Regional Forester
Forest Service
U. S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:
Mr. Reginald M. Watt, Watt and Leverenz, Attorneys at Law (Certified Mail)
Regional Forester, San Francisco
Mr. Nelson E. Divine
Mr. Raymond E. Bryant
Mr. Walton W. Gill, Attorney at Law
Office of the General Counsel, USDA
FS, Div of Watershed Mgmt, USDA (12)
300 (6)
200
Gower Federal Service
Appeals List No. 1

Mining Claims: Power Site Lands 3530

A mining claim which is null and void at its inception because the land is embraced within a power site reserve cannot be subsequently validated under section 2 of the Mining Claims Rights Restoration Act of 1955 when, at the time of the enactment of that act, the land in issue was included in a power project operating and being constructed under the Federal Power Act.

Donald B. Marshall, S 2898 (Jan 20, 1970)

[illegible] OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 FEB 9 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

In reply refer to:
142
S 2898

Jan 20, 1970

CERTIFIED MAIL
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DECISION

Donald B. Marshall	:	Donnie placer mining claim located
	:	in sec. 5, T. 4 S., R. 18 E., M.D.M.,
	:	California.
	:	

Mining Claim Declared Null and Void **Ab Initio**

The above-named mining claim was purportedly located on August 31, 1953. Bureau records show that lots 5, 6 and 7, E½SW¼ and SE¼NW¼ sec. 5 of the above-described township, and other lands, were included in public land withdrawn in Power Site Reserve No. 204 which was approved by Executive Order dated September 4, 1911. The Donnie placer mining claim embraces the lands within the power site reserve, and the withdrawal is still in effect.

Section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1964), provides that all lands then reserved for power sites were withdrawn from location or other disposal under the mining laws of the United States, and the Secretary of the Interior was precluded by that act from opening such lands to location until after he is notified that the Federal Power Commission has made a favorable determination that the value of the withdrawn land for the purposes of power development will not be injured or destroyed by such entry. No such determination was made by the Federal Power Commission concerning the lands in issue. Consequently, the above-described land was not open to mining location at the time of the purported location on August 31, 1953, and a mining claim so located is null and void ab initio. See Dorothy L. Benton, A-30729 (May 31, 1967).

On October 18, 1958 (which is after the enactment of the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1964)), a notice of amended location of the Donnie placer mining claim, also seeking to embrace the described lands in the power site reserve, was executed.

Section 2 of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1964), opened to entry for location under the mining laws of the United States public lands that had theretofore been withdrawn for power sites, but the act excluded such lands which are in any project operating or being constructed under a license or permit issued under the Federal Power Act. On February 28, 1955, which is prior to the enactment of the cited act and, thus, prior to the attempted relocation, the lands in issue were included within

Power Project No. 2179. The original plan for Project No. 2179 development as stated in the license issued under the Federal Power Act was for construction of Bagby reservoir and powerplant, enlargement of Exchequer Reservoir (Lake McClure) and powerplant, and construction of Snelling reservoir and powerplant, all on the Merced River. The facilities have been constructed, and subsequently enlarged, and additional developments are now planned. Consequently, the described lands were not opened to appropriation under the mining laws upon enactment of the Mining Claims Rights Restoration Act, and such lands have not at any time been open to such appropriation since enactment of the Federal Power Act of June 10, 1920, because, as stated, section 2 of the Mining Claims Rights Restoration Act expressly excluded such lands from such appropriation. 1/ A mining claim on such land is null and void from its inception.

Accordingly, the Donnie mining claim is null and void ab initio to the extent that such claim embraces land within lots 5, 6 and 7, E½SW¼, SE¼NW¼ sec. 5, T. 4 S., R. 18 E., M.D.M.

Mr. Marshall, as the owner of the purported mining claim in issue, has the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5, since there is one claim adversely affected by this decision. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Boyd L Rasmussen
Director

Enclosures 2

Dist. on page 3

1/ All of the subject lands except the SE¼NW¼ sec. 5 were, at the time of the attempted relocation, also held under an uncanceled preliminary permit issued under the Federal Power Act, and such lands under section 2 of the Mining Claims Rights Restoration Act are also withdrawn from appropriation under the mining laws.

DISTRIBUTION:
Mr. Donald B. Marshall (Certified Mail)
Hon. George Murphy, United States Senate
Hon. Alan Cranston, United States Senate
Hon. Del Clawson, House of Representatives
Hon. Gene Chappie, Member of the Assembly, California Legislature
Chief, Div. of Energy and Minerals
300 (6)
200
Gower Federal Service
Appeals List No. 1

Mining Claims: Power Site Lands 3530

Although mining claims were located in a power site reserve after enactment of section 2 of the Mining Claims Rights Restoration Act of 1955, the mining claims are null and void ab initio where the lands, at the time of location, were held under an uncanceled preliminary permit issued under the Federal Power Act, or are included in an operating power project under a license issued pursuant to the Federal Power Act.

Donald B. Marshall, S 2892 etc. (Jan 20, 1970)

OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 FEB 9 AM 10 00

In reply refer to:
142
S 2892 through S 2897, inc.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

Jan 20, 1970

CERTIFIED MAIL
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DECISION

Donald B. Marshall	:	The Hole placer mining claim located in secs. 4 and 9, the Grapevine placer mining claim located in sec. 4, Duke, Duke's No. 2, Duke No. 3, and Mother's Day placer mining claims located in secs. 5 and 8, T. 4 S., R. 17 E., M.D.M., California.

Mining Claims Declared Null and Void Ab Initio

I

The Hole mining claim was purportedly located by Mr. Marshall and another on May 5, 1960. That part of the Hole claim identified as the N½NW¼NW¼ (a portion of lot 1) sec. 9 was included in a patent which was issued on June 1, 1898, with no mineral reservation in the United States. The cornerstone of the Federal legislation dealing with mineral lands is the act of May 10, 1872, 30 U.S.C. § 22 (1964). See footnote one, United States v. Coleman, 390 U.S. 599 (1968). The act of May 10, 1872, expressly limits the exploration and purchase under the Federal mining laws to "lands belonging to the United States." Consequently, the purported location of that part of The Hole mining claim embracing land in the N½NW¼NW¼ sec. 9, T. 4 S., R. 17 E., M.D.M., is a nullity.

II

Among other lands, the S½SW¼, NW¼SW¼ sec. 4, lots 5, 6 and 7, E½SW¼, SW¼SE¼, and SE¼NW¼ sec. 5, and lots 2 and 3 sec. 8 of the above-identified **township** were included in land withdrawn in Power Site Reserve No. 472 approved by Executive Order dated January 14, 1915. The above-named mining claims embrace lands within the power site reserve, and the withdrawal is still in effect. The mining claims were located between September 8, 1958, and August 1, 1968, inclusive, so the claims were located after the enactment of the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1964); see also 43 CFR 3530.0-1 et seq. of the departmental regulations.

Section 2 of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1964), opened to entry for location under the mining laws of the United States, public lands that had theretofore been withdrawn or would thereafter be withdrawn for power sites, except (1) lands which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other act, or (2) lands which are under examination or survey by a prospective licensee of the Federal Power Commission.

All of the above-described lands, except the SE¼NW¼ sec. 5, were included in an application filed on February 28, 1955 (which is prior to any of the locations in issue) by the Merced Irrigation District; a preliminary permit under the Federal Power Act became effective on August 1, 1955; and on April 8, 1964, an approved license issued to the Irrigation District for the project which includes all land sought by the permittee except the NE¼SW¼ sec. 5. As to the lands not included in the permit as issued (the SE¼NW¼, NE¼SW¼ sec. 5), such lands were delimited on the map for Power Project No. 2179 dated February 1, 1955 (which is also prior to any of the locations in issue), along with part of the other lands in issue. Project No. 2179 was a project under the Federal Power Act providing for construction of several reservoirs and powerplants--the planned development is now constructed and there are plans for future enlargement. Consequently, the identified lands were not opened to appropriation under the mining laws upon enactment of the Mining Claims Rights Restoration Act of 1955, and the lands were withdrawn from operation of the mining laws at the time the mining claims in issue were purportedly located.

Applying one of the stated exceptions contained in the Mining Claims Rights Restoration Act, supra, the Department has held that land held under an uncanceled preliminary permit issued under the Federal Power Act is not open to location under the mining laws, and mining locations for such lands are null and void ab initio. C. A. Anderson, A-29999 (March 23, 1964); Francis N. Dlouhy, A-28597 (May 18, 1962). The same is true of land in an operating power project. Accordingly, The Hole, Grapevine, Duke, Duke's No. 2, Duke No. 3, and Mother's Day mining claims are null and void ab initio to the extent that such claims embrace lands within the S½SW¼, NW¼SW¼ sec. 4, and lots 5, 6 and 7, E½SW¼, SW¼SE¼, SE¼NW¼ sec. 5, and lots 2 and 3, sec. 8, T. 4 S., R. 17 E., M.D.M., California. 1/

Mr. Marshall, as the owner of the purported mining claims in issue, has the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on

---

1/ Some of the lands in issue were also withdrawn from appropriation under the mining laws at the time of the purported locations of these mining claims by withdrawals other than those mentioned in this decision.

the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Boyd L. Rasmussen
Director

Enclosures 2

DISTRIBUTION:
Mr. Donald B. Marshall (Certified Mail)
Merced Irrigation District, Merced, California
Hon. George Murphy, United States Senate
Hon. Alan Cranston, United States Senate
Hon. Del Clawson, House of Representatives
Hon. Gene Chappie, Member of the Assembly, California Legislature
Chief, Div. of Energy and Minerals
300 (6)
200
Gower Federal Service
Appeals List No. 1

appeal to Sec A-31265

Mining Claims: Withdrawn Land 3400.1

Mining claims located on lands previously embraced within a public water reserve, by reason of an order invoked pursuant to the inherent authority vested in the President of the United States, are void *ab initio*, since such lands are reserved from appropriation under the general mining laws until the order is revoked by the President or by an act of Congress.

Mining Claims: Generally 3400

Since a mining claim, on which a valid discovery has been made, which was located on land open to mineral appropriation, is a property right in such land, subsequent action by the Government under the provisions of either the Antiquities Act or the Classification and Multiple-Use Act would not divest the mining claimant of his valid claim.

Mining Claims:

Bentonite of a type which is not shown to be suitable for a commercial use for which a market is established, is merely a common clay, and a common clay is not locatable.

United States of America v. Glen S. Gunn et al., Contest No. R-1356 **(February 13, 1970)**

DEPARTMENT OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 MAR 2 AM 10 00

In reply refer to:
142
Contest No. R-1356

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 13, 1970

CERTIFIED MAIL
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DECISION

United States of America,
Contestant

v.

Glen S. Gunn; Julia D. Gunn;
Hester L. Hamman now known as
Hester L. Hamman Strahan; and
Patricia Lee Kaer and Helen J.
Brind as heirs of Jobe L. Hamman,
deceased,
Contestees-Appellants

Valley View Nos. 1 and 2, Venus,
North Star, G & H, Hester, Michael,
and Ann placer mining claims located
in secs. 22 and 27, T. 10 N., R.
2 E., S.B.M., California.

Decision Affirmed in Part, Reversed in Part

The above-named appellants have appealed from that part of the Hearing Examiner's decision dated May 28, 1969, which determined that (1) those parts of the Valley View No. 2, Venus, North Star, and G & H claims within the SW¼NW¼ and the NW¼SW¼ of sec. 22 are null and void ab initio for having been located on land previously withdrawn from such appropriation; (2) the Valley View Nos. 1 and 2 mining claims are null and void for lack of a timely discovery of a valuable mineral deposit; and (3) those parts of the Hester, Michael, Ann and Venus within 15 feet of each side and parallel to a certain road are abandoned.

I

We shall first give consideration to that part of the Hearing Examiner's decision which determined that those parts of the Venus, G & H, North Star, and Valley View No. 2 claims within the SW¼NW¼, NW¼SW¼ sec. 22 of the above township are null and void ab initio. There was no charge in the amended contest complaint alleging that such mining claims were located on land withdrawn from such appropriation, but no hearing is required to declare mining claims invalid ab initio where at the time of location of the claims the land was not open to such location--a hearing is only necessary to determine an issue of fact, not an issue of law. C. V. Armstrong et al., A-30889 (February 28, 1968).

On August 7, 1914, the Secretary of the Interior referred to the President of the United States a recommendation that certain lands, including the SW¼NW¼, NW¼SW¼ sec. 22, T. 10 N., R. 2 E., be included in Public Water Reserve No. 22 "in order that right to the use of the few springs located in the areas may remain in the public." On August 8, 1914, President Woodrow Wilson signed an order establishing Public Water Reserve No. 22, California No. 4, and ordering that, among other lands, the aforesaid SW¼NW¼, NW¼SW¼ sec. 22, was withdrawn from settlement, location, sale or entry, and reserved for public use (Exh. 12). On August 18, 1914, the order was entered upon the tract book of the land office at Los Angeles, California, to give the public notice of its contents. Although the order states that it is issued pursuant to the act of June 25, 1910, 43 U.S.C. § 141 (1964), 1/ the nature of the order establishes that it also invokes the general or inherent authority vested in the President by virtue of his office to cause a portion of the public domain to be appropriated for public use. See United States v. Midwest Oil Co., 236 U.S. 459 (1915). The Department has held that where both the act and the President's inherent powers are invoked in a withdrawal order, appropriation under the mining laws is thereafter prohibited unless there is specific language permitting mining activity. P & G Mining Company, 67 I.D. 217 (1960). Therefore, since the withdrawal order for Public Water Reserve No. 22 did not authorize appropriation under the mining laws, mining location on lands included within that order was prohibited.

The appellants argue that the order for Public Water Reserve No. 22 "is illegal and void because the terrain is of such character that it could not be, and never had been a water reserve." They also assert that the public water reserve is "illegal because it has never been used for the 45 years before the hearing, i.e. 1914-1969." The United States Supreme Court in United States v. Midwest Oil Co., supra, gives the short answer to the appellants' contentions by pointing out that such withdrawals invoking the inherent powers of the President remain in force until revoked by the President or by an act of Congress. Until lands so withdrawn are restored to appropriation under the mining laws, any mining claim located on such lands is invalid even though there be merit, which the record does not show, to the appellants' apparent assertion that the lands do not include a source of water, or that the lands have not been used by the public for the designated purpose of the water reserve. The lands in issue have never been restored from the public water reserve.

1/ Section 2 of the act of June 25, 1910, 36 Stat. 847, provides that lands withdrawn temporarily for a purpose coming within that act are not thereby closed to appropriation under the mining laws for metalliferous minerals. Coeur d'Alene Crescent Mining Company, 53 I.D. 531, 533 (1931).

The subject mining claims adversed by this contest proceeding were originally located between 1954 and 1956 (Tr. 14, 16, 53), and on November 25, 1968, amended locations for the claims were recorded (Tr. 13). Accordingly, since the lands were not open to location under the mining laws at the times of the purported locations and amended locations, or at any time thereafter, that part of the Hearing Examiner's decision determining that those parts of the Valley View No. 2, Venus, North Star, and G & H mining claims embraced within the SW¼NW¼, NW¼SW¼ sec. 22, T. 10 N., R. 2 E., are null and void *ab initio* is affirmed.

II

The appellants assert that members of the public have drawn the Bureau's attention to the possible value which certain of the lands embraced within the mining claims in issue may have as archaeological sites. They contend, therefore, that the contest proceeding was improperly initiated for the benefit of private individuals and not for a governmental purpose. By enactment of the Antiquities Act of June 8, 1906, 16 U.S.C. § 432, 433 (1964), Congress clearly expressed its intent to consider as a public purpose the examination of ruins, excavation of archaeological sites, and gathering of objects of antiquity upon the public lands for study and preservation by reputable museums, universities, or other recognized scientific or educational institutions. Thus, it is in the public interest and proper for the Bureau to initiate contest proceedings or take whatever other procedures are available under the law and departmental regulations to protect archaeological values in public lands.

Nevertheless, it should be made clear that the possible archaeological value of the lands in issue is not germane to the issue posed by this contest proceeding, which is to determine whether the mining claims are valid. A mining claim, one in which a discovery which is valid under the mining laws had been made at a time when the lands were open to such appropriation, and which has remained valid continuously thereafter, is not invalidated by subsequent action taken by the Department under the provisions of either the Antiquities Act, *supra*, or the Classification and Multiple-Use Act of September 19, 1964, 43 U.S.C. §§ 1411-1418 (1964). 2/ Cf. *Vernard E. Jones*, 76 I.D. 133 (1969). Thus, when the Bureau mineral examiner reported that he could not verify valid discoveries on the lands, the contest proceeding against the claims was appropriately initiated since

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2/ By a notice dated June 24, 1968, the W½NW¼, NW¼, N½SW¼, NW¼SE¼ sec. 22 were proposed for multiple-use management pursuant to the act of September 19, 1964, *supra*, to protect the archaeological values. See 33 F.R. 9560 (June 29, 1968). As stated in the notice, the publication of the proposed classification segregated the lands *thereafter* from appropriation under the mining laws.

it was deemed by the responsible Bureau personnel that the lands are more valuable for an archaeological site than for mineral exploration, and the activities are not compatible. The purpose of the contest proceeding was to give the mining claimants a reasonable opportunity to establish the truth of their allegation that they do have a valid discovery on each of the claims, a discovery made at a time when the land was open to such location.

The appellants argue that the hearing should not have been held until they had been informed of the identity of such private persons or organizations who may have expressed concern regarding the preservation of the archaeological objects on the site. Since the archaeological value of the lands is not in issue, the information requested by the mining claimants concerning the identity of such persons could have no significance in determining the validity of the mining claims. Moreover, the amended contest complaint did supply the requested information by noting that a permit, issued pursuant to the Antiquities Act, supra, concerning the lands, had issued to the San Bernardino Museum.

The appellants have offered in evidence (Exh. A) a copy of a newspaper article stating that a Bureau employee had informed a newspaper reporter that a Bureau mineral examiner had, after an examination of the claims, concluded that he had not been able to verify a discovery on the claims, and the land office would, therefore, initiate adverse proceedings against the claims. The newspaper article erroneously stated that the claims "have been declared invalid," but the article explained that, if an answer were filed to the contest complaint, a hearing would be held before a hearing examiner to consider the evidence presented by the parties and determine the validity of the claims. Clearly, a reading of the article shows the reporter had not been informed that the claims were invalid, but merely that such a charge had been made against the claims.

In their appeal the appellants paraphrase from a departmental news release issued by a former Secretary of the Interior in which he recognized the potential damage that mining activity could cause to the archaeological site. The news release relates to the fact that the lands had been segregated from future mineral exploration by being included for proposed multiple-use management classification; it did not relate to vested rights, if any, in the lands originating prior to the publication of the aforesaid notice in the Federal Register.

The appellants argue that the news release and the interest of the press in the archaeological values of the land have made it impossible for them to have received fair and impartial treatment in this contest proceeding, and they assert, for that reason, the proceeding should be dismissed. There is no merit to this contention. The contest proceeding was held in strict conformance with the Administrative Procedure Act, now codified at 5 U.S.C. § 554 et seq. (1964), by which the Congress has provided adequate

safeguards in adjudications by executive agencies. Each hearing examiner of the Bureau of Land Management operates independently as provided by the Administrative Procedure Act, supra; he is not responsible to or subject to the supervision or direction of anyone engaged in the performance of investigative or prosecuting functions of the Department. Furthermore, the hearing examiners are trained in the law and fully understand that their respective decisions must be based exclusively on the record as compiled at the hearing--they are not likely to be subject to impression by matters not presented as part of the official record as may occur in a situation involving a jury of lay persons. The appellants have failed to show that the hearing was improperly held or that the contest proceeding should be dismissed.

III

We shall next give consideration to that part of the Hearing Examiner's decision determining that the Valley View No. 1 claim and that part of the Valley View No. 2 claim which is not void ab initio, are null and void for lack of a valid discovery of a valuable mineral deposit within the limits of these claims made prior to the time when such lands were segregated from such location by the aforementioned proposed multiple-use management classification.

The hearing was held before the Hearing Examiner on January 21, 1969. From the testimony it is clear that the principal mineral claimed to have been discovered on the two claims is bentonite clay.

The Bureau mineral examiner testified that clay removed from the Valley View No. 1 was sent to a laboratory for tests to determine whether it had commercial use for rotary drilling, rotary mud drilling, or decolorization of crude oils (Tr. 30, 33). The sample showed that the bentonite found on the claims failed tests required for any of these uses (Tr. 33-37, 44-45, 46, 48). The Bureau mineral examiner took two mineral samples from the Valley View No. 1 claim and one sample from the Valley View No. 2 claim (Tr. 44), and, from his examinations of the claims and the results of the analyses of the material in the samples, he testified that he could find no evidence of valuable minerals within these claims (Tr. 40).

Mr. Gunn has never had material from either of these claims analyzed (Tr. 60). He testified that he has seen gold and silver on the claims (Tr. 59), and that there are gold and silver analyzed at a quality of two cents a yard in the area of the claims (Tr. 60-61, 106). He has sold no material from the Valley View claims (Tr. 65); similar clay from other lands was sold for use in sliding pipes across a street (Tr. 54-55).

A consulting geologist, employed by Mr. Gunn, testified that in his opinion the bentonite on the claims could be used commercially as a binder for

pelletizing iron (Tr. 90). He testified that he has made no tests of the material found on the claims other than to examine it visually (Tr. 91, 92, 97), but he has tested similar material as a binder for pelletizing iron (Tr. 96). The witness does not know of anybody who has commercially used such material for such purpose (Tr. 94). He testified that there is no specification as to clays that could be used as a binder for pelletizing iron, and that any clay that is capable of agglomerating the particles will do (Tr. 102). The only other minerals he found on the claims were agate and opal (Tr. 89). In his opinion such material was not usable for lapidary purposes but would have use as ornaments for rock gardens (Tr. 94-95). Mr. Gunn testified concerning other minerals he has found on the claims, but made no serious effort to make a showing as to the quantity or quality of such minerals.

In the Department's discussion in United States v. Mary A. Mattey, 67 I.D. 63 (1960), concerning locations based upon deposits of clay, it was pointed out that:

1. Common clay has never been locatable under the mining laws.

2. Clay of an exceptional nature may be locatable under the mining laws.

3. However, the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristic of the clay itself.

The appellants have not established that the type of bentonite exposed on the Valley View Nos. 1 and 2 claims is other than a common clay not locatable under the mining laws. The fact that at one time a temporary market for a small quantity of similar clay developed is of little significance, especially since, as pointed out in Mattey supra, the existence of a market is never the sole test of validity of a location for clay. The appellants argue that their expert witness' experience requires that his testimony be given greater weight than that of the Bureau mineral examiner who, although trained, has never been employed in the ceramic field. The testimony of the consulting geologist was given full weight, but his testimony does not establish that the material is other than common clay. The witness' suggestion that the clay be used as a binder, a use for the material not even requiring specifications, does not establish that the clay has an exceptional nature. Furthermore, there is no evidence that there is a market for such material for use as a binder or any other purpose, only that the witness hoped a market could be developed in the indefinite future.

In connection with the evidence relating to the lack of showing that the material could be extracted, removed and marketed at a profit (the so-called

marketability test of discovery), the appellants contend that the marketability test was improperly applied because the rule has never been published in the Federal Register. The Department held in United States v. E. A. Barrows et al., A-31023 (November 28, 1969), that the marketability rule need not be published in the Federal Register since it is an inherent part of the prudent man test which has been employed since 1894; it is a recognized standard and not a new substantive rule or statement of policy. Furthermore, in addition to the fact that the mining claimants have not made the required showing of a market for the clay on the Valley View claims, the material is not locatable in any event because it is merely a common variety of clay, lacking an exceptional nature. As to the poor quality agate and opal found on the claims, such stones, having no greater use than as an ornament in a rock garden, are also not a valuable deposit locatable under the mining laws as contemplated by 30 U.S.C. § 22 (1964).

The marginal quantities of gold and silver found on other claims in the area, together with the unverified quantities of the precious metals which Mr. Gunn testified he had seen on the claims in issue, can at best be deemed merely a geological inference, and a geological inference by itself is not a basis for establishing a discovery under the mining laws. See United States v. John T. Collier et al., A-30249 (April 19, 1965).

For the reasons stated, that part of the Hearing Examiner's decision determining that the Valley View No. 1 and that part of the Valley View No. 2 which is not void ab initio are null and void for lack of a showing of a valid discovery within the boundaries of either claim is affirmed.

IV

The Hearing Examiner held that those parts of the Hester, Michael, Ann and Venus claims which lie within a strip of land 30 feet wide, 15 feet on each side of and parallel to the existing road across the claims as originally located, were abandoned when the claims were relocated so as to no longer embrace such lands.

At the hearing the mining claimants were informed that the claims as to the lands embraced within the amended locations not within the original locations were null and void ab initio for the reason that such land, not previously in a claim, had been segregated from appropriation under the mining laws pursuant to the aforesaid classification for proposed multiple-use management prior to the time of the new locations. The attorney for the mining claimants stated that in the event the new locations of the claims are invalid, the mining claimants wanted the original locations, and they denied abandoning the original locations (Tr. 17).

Abandonment is a question of intent. It is legally defined as the relinquishment of property to which a person is entitled with no purpose of again

claiming it and without any concern as to who may subsequently take possession. It is determined from a person's acts and statements, together with any circumstances of the particular case. *State of South Dakota* v. *Madill et al.*, 53 I.D. 195, 199 (1930). Upon abandonment of a mining claim the land therein reverts to the public domain and the mining claimant surrenders his right to exclusive possession thereof. *Black* v. *Elkhorn Mining Co., Ltd.*, 163 U.S. 445 (1896). A departmental decision declaring a mining claim abandoned does not have the conclusiveness in legal effect that a departmental decision would have adjudging a claim null and void because a discovery has not been made thereon or the land was nonmineral. *Solicitor's Opinion*, 53 I.D. 491, 495 (1931).

The contest record shows that Mr. Gunn determined the boundaries of the original claims without instruments (Tr. 53), and there is uncertainty as to the exact boundaries intended for the claims. After obtaining the services of a consulting geologist, Mr. Gunn attempted to amend his locations to conform with suggestions of the expert (Tr. 100). However, when the adverse proceedings were initiated against the original locations the mining claimants promptly defended the locations. The attorney for the mining claimant merely made a conditional offer to relinquish the lands now under consideration in the original locations, but the conditions were never met.

The foregoing evidence is not conclusive to show an intent to abandon the lands in issue. Accordingly, that part of the Hearing Examiner's decision which held parts of the Hester, Michael, Ann and Venus mining claims abandoned is set aside.

The above-named appellants have the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision, the total filing fee will be $25. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the attorney for the adverse party who must be served is:

Regional Solicitor
United States Department of the Interior
Room 7759 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

Dist. on page 9

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Appeals List No. 1

appeal to Sec A-31263

Contests and Protests: Generally 1852

A protest against a Bureau decision will be dismissed where the protestant does not demonstrate any error in the protested decision.

William R. White, et al., R 31 etc. **(February 24, 1970)**

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 MAR 2 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

In reply refer to:
142
R 31
34
35
February 24, 1970
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

William R. White :
Mauritz J. Kallerud :
Howard J. Winterbottom :
Occidental Petroleum Corporation :
:
American Potash & Chemical Corporation, :
Protestant :
:

Sodium

Protest Dismissed

American Potash & Chemical Corporation ("American") has protested against the Bureau decision dated October 16, 1969, which remanded the cases pertaining to the preference right lease applications R 31 of William R. White, R 34 of Mauritz J. Kallerud, and R 35 of Howard J. Winterbottom, to the Riverside District and Land Office for issuance of the requested leases, and approval of the pending assignments of the prospecting permits to Occidental Petroleum Corporation ("Occidental") in the absence of other objections than the late filing of the applications for the preference right leases.

In its protest against the Bureau decision, American asserts that the determination by the district office that the applications of the individual appellants below (White, Kallerud and Winterbottom) should be rejected for untimely filing was an exercise of discretion not to waive the untimeliness and should not be reversed; that the waiver of the untimeliness of the filings below was precluded by two of the express exceptions to permissible waiver under 43 CFR 1821.2-2(g); that failure of the Director to be completely informed of significant changes in the record during pendency of the appeal prior to decision requires a reconsideration of the Bureau decision of October 16, 1969; that the Bureau decision is based on the erroneous premise that the record reflected a discovery of a commercial sodium deposit by the individual appellants on lands comprehended by that decision; that the action of Occidental and its subsidiary Searles Lake Chemical Corporation ("SLCC") in applying for prospecting permits is inconsistent with their claimed right to preference right leases on the same lands and estops them from all claims to preference right leases; and that authority cited in the Bureau decision

for waiving untimeliness of the filings of the individual appellants below was based on a statutory limitation on the power of the Secretary to disapprove assignments of oil and gas leases not found in the instant cases. American then asked that a hearing be held for the purpose of oral argument in support of its protest.

An answer to the protest of American was filed by attorneys for Occidental, SLCC, and Messrs. White, Kallerud and Winterbottom, in which it is argued that error in the district office records cannot prejudice the rights of the preference right lease applicants, and that American is not an intervening party through its permit applications filed in January 1969. The answer also contends that Occidental, as parent corporation to its wholly-owned subsidiary SLCC, is the primary party in interest, and the request of Occidental to the district office to have SLCC recorded as the proper entity to hold its operations at Searles Lake (filed after the assignments to Occidental were submitted for approval in July 1968) does not negate the holding in the Bureau decision of October 16, 1969, that the assignments from White, Kallerud and Winterbottom to Occidental should be approved. The answer also contends the subsequent applications for sodium prospecting permits filed by SLCC affecting some of the subject lands were a defensive measure only, prompted by the action instituted by American.

American replied to the answer by Occidental, contending that the answer fails to deal with substantive issues and obscures many relevant facts, and American renewed its request that a hearing be held in this matter.

The entire record has been reviewed carefully. For background information we list the following pertinent information relating to the sodium prospecting permits R 31, 34 and 35. These permits were issued effective November 1, 1966, for a 2-year period: R 31 to White for 2,483.10 acres; R 34 to Kallerud for 1,725.01 acres; and R 35 to Winterbottom for 1,240 acres. On July 25, 1968, assignments of record title to each permit were filed by Occidental, together with requests for approval of the assignments and approval of excess acreage. 1/ The district office took no action on either the requests for

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1/ Permit R 31, William R. White, embraced lots 2, 3, S½NE¼, SE¼NW¼, NE¼SW¼, NW¼SE¼ section 19, T. 26 S., R. 44 E., N½N½, SW¼NE¼, S½NW¼ section 21, N½N½ section 22, SW¼NW¼, NE¼SW¼, NW¼SE¼, S½SE¼ section 23, S½ section 24, T. 26 S., R. 43 E., M.D.M., California, for which a preference right lease was sought as well as NW¼NE¼, S½NE¼, E½NW¼, NE¼SW¼, N½SE¼ section 20, SE¼NE¼, N½SW¼, SE¼SW¼, SE¼ section 21, S½N½, S½ section 22, NW¼SW¼, S½SW¼ section 23, T. 26 S., R. 43 E.

Permit R 34, Mauritz J. Kallerud, embraced SE¼NE¼, NE¼SE¼, S½SE¼ section 17, lot 4, SE¼SW¼, NE¼SE¼, S½SE¼ section 19, NE¼SW¼, S½NW¼, NW¼NE¼, NW¼SW¼ section 20, lot 1 section 30, T. 26 S., R. 44 E., M.D.M., California, for

approval of the assignments or for the excess acreage. On October 16, 1968, American filed a protest against approval of the assignments of sodium applications, permits and leases into Occidental, asserting essentially that Occidental had failed to comply with the applicable Federal regulations governing sodium. The protest was dismissed by the district office in its decision of February 18, 1969, for the reason that American had failed to serve a copy of the protest on Occidental or the other persons named as being involved in the protested leases and permits. American did not appeal from this decision.

On October 31, 1968, the 2-year term of the prospecting permits R 31, 34 and 35 expired, but the regulations allow sodium prospecting permittees 30 days after expiration of the permit to file an application for a preference right lease. 43 CFR 3152.5. Such applications were filed on December 13, 1968, by White and by Kallerud, and on December 18, 1968, by Winterbottom. The applications were for less than the total acreage in the respective permits, but were for all the land included in one of the assignments to Occidental, for each permit. The land not included in the application for preference right lease was indicated as being included in an application for a right-of-way for a solar pond, with appropriate serial numbers being indicated.

On February 20, 1969, the district office held that the prospecting permits R 31, 34 and 35 had expired, rejected the preference right lease applications as not timely filed, and declared the 6 assignments to Occidental as moot since the permits have expired. Appeals were taken by each permittee and by Occidental.

In a memorandum dated October 3, 1969, the Director, Geological Survey, reported that discovery of sodium had been made within the area of each permit R 31, 34 and 35 for which preference right lease was sought, and recommended granting of such leases, so this office, by decision of October 16, 1969, ruled that the lateness of the filings for preference right leases could be waived and the applications accepted as within the purview of 43 CFR 1821.2-2(g).

American argues that the district manager was the "authorized officer" in connection with the subject filings, within the ambit of Superior Oil Company v. Udall, 409 F. 2d 1115 (D.C. Cir. 1969), and being in possession of all facts relating to the subject lands (which it is intimated the Director did

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Footnote 1 continued

which a preference right lease was sought, as well as NE¼NE¼, S½NE¼, SE¼, NE¼SW¼, S½SW¼ section 20, N½, N½SW¼, NW¼SE¼ section 29, lot 2, NE¼, E½NW¼ section 30, T. 26 S., R. 44 E.

Permit R 35, Howard J. Winterbottom, embraced NE¼NE¼ section 26, N½N½ section 25, T. 26 S., R. 43 E., M.D.M., California, for which a preference right lease was sought, as well as NE¼NW¼, N½NE¼ section 28, N½NW¼, NE¼, NE¼SE¼ section 27, NW¼NE¼, S½NE¼, NW¼, N½S½ section 26, S½N½, NW¼SW¼ section 25, T. 26 S., R. 43 E.

There were two assignments to Occidental for each permit: one describing the lands included in the preference right lease application as indicated above, and one describing all the other lands in the permit.

not have), his decision to reject the preference right lease applications necessarily must be final. We recognize that there are a large number of differences between the situation which prompted Superior and the situation surrounding the subject preference right lease applications. Superior arose from a sale under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1964), and not under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (1964), which governs the subject applications for sodium leases. The question in Superior was whether an unsigned high bid could be accepted. We are not persuaded by the argument of American that the district manager was the "authorized officer" for the subject sodium applications in the same context as the Court, in Superior, held the Manager of the Bureau's OCS office in New Orleans to be in connection with the sale of oil and gas leases on the Outer Continental Shelf. Also, we must point out a material difference between an unsigned bid and a late application for a preference right lease. In Superior there were several competing bids, all filed simultaneously with the unsigned high bid, so that rights of others than the entity which submitted the unsigned bid existed and demanded consideration in the ultimate disposition of the OCS lease involved. Here, the applications for preference right lease, although not filed within the 30-day period allowed by regulation, were filed before any other application under the sodium regulations was submitted for the same lands. We hold the opinion that review of the district office action, on appeal, was a proper function under the supervisory authority of the Director, and was not contrary to any regulation or precedent.

American argues that it was improper for the Bureau to direct the district office to accept the untimely applications for preference right lease under 43 CFR 1821.2-2(g) because the rights of third parties had intervened, and the authorized officer had determined that further consideration of the late applications would interfere with orderly conduct of the business of his office. American apparently takes the position that its applications made January 20, 1969, and others at later dates, for land within the area included in the preference right lease applications R 31, 34 and 35, created a third party right entitled to consideration during the adjudication of the preference right lease applications. An application for a prospecting permit under the Mineral Leasing Act, supra, for land not classified as valuable for the mineral sought, does not create a vested right to a prospecting permit but only an inchoate right to receive a prospecting permit if the Secretary decides, in his discretion, to make the land available for such mineral prospecting. See e.g., Warwick W. Downing, 60 I.D. 433 (1950). So the applications of American for sodium prospecting permits on the lands included in the preference right lease applications did not create any third party rights within the context of 43 CFR 1821.2-2(g). The decision of the district manager rejecting the preference right lease applications did not indicate that the manager gave any consideration to the waiver of timely filing permitted by 43 CFR 1821.2-2(g). It cannot be assumed that the adverse decision by the district manager was based on his determination that acceptance of the late filings would unduly interfere with the orderly

conduct of business in his office. It was not improper for this office to remand the cases for acceptance of the late filings under the circumstances presented.

American argues that the Director was not aware of significant developments relating to Occidental and SLCC when his decision was issued, contending that Occidental had named SLCC as the proper entity to hold sodium leases, permits and applications in the Searles Lake area, and had submitted new and different assignments of the permits R 31, 34 and 35, naming SLCC as assignee in lieu of those assignments filed earlier and conveying record title in the permits to Occidental. American is correct that this office was unaware of the second set of assignments filed in July 1969, but as the decision under consideration was issued in February 1969, and related to actions taken in December 1968, the conclusions in the decision of October 16, 1969, are deemed to reflect correctly the holding on the issues presented. If the assignments to Occidental were withdrawn and later assignments to SLCC were filed for approval, action on the later assignments may be taken after issuance of the preference right leases, as appropriate. In any event, the records before us do not contain any later assignments, but they do contain information that SLCC is a wholly-owned subsidiary of Occidental, which is recognized as the primary party in interest.

American argues that the decision of October 16, 1969, is based on the erroneous premise that the record reflected discovery of commercial sodium deposits because no finding that such discovery had been made existed when the district manager made his decision on February 20, 1969. The statute, 30 U.S.C. § 262 (1964), provides that upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium have been discovered by the permittee within the area covered by his permit, and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any and all of the lands embraced in the permit. Thus, if any of the lands embraced in sodium prospecting permits R 31, 34 or 35 disclosed such a discovery of sodium was made during the life of the permit, the permittee was entitled, by law, to a preference right lease. The decision of the district manager indicates only the untimely filing of the applications for preference right lease was considered in the rejection. There is no indication that any inquiry was made to the Geological Survey to ascertain if a discovery of valuable sodium deposits had been made during the life of the permits. To correct this deficiency in the record, this office asked the Director, Geological Survey, for a report, and received the response that a discovery of commercial sodium had been made within each permitted area during the life of the permit, together with the recommendation that the preference right leases be issued, as applied for. When the decision of October 16, 1969, was issued, each case file did contain a notice that a discovery of sodium had been made within the permitted area during the life

of the permit. So, as each permittee had earned a statutory right to a sodium lease, it was proper to accept the late filings for such leases under 43 CFR 1821.2-2(g).

American argues that Occidental and SLCC have made other applications under the sodium regulations for lands contained in the former prospecting permits R 31, 34 and 35, and so are estopped from any claims of preference right to a sodium lease. Such action by Occidental or SLCC, if true, does not have any bearing on the issues contained in the decision of the district manager dated February 20, 1969, nor in our decision of October 16, 1969. The district manager will adjudicate all pending applications for sodium prospecting permits affecting lands contained in the preference right leases after action on the applications for such leases has been concluded.

American argues that the Director's citation of Alice R. Rudie, A-30061 (March 25, 1964), is not authority to accept untimely filings of preference right lease applications for R 31, 34 and 35. Rudie was cited as a precedent for waiver of the regulatory time period within which to file documents where no third party rights are involved. And while Rudie does relate to an oil and gas lease assignment, it is considered to be appropriate in these cases as the Mineral Leasing Act, supra, is the governing statute for sodium and for oil and gas leases. E. W. Danklef, et al., Utah 0103128 etc. (March 6, 1968), cited in our decision of October 16, 1969, relates to the untimely filing of applications for preference right leases from coal prospecting permits, and is very closely analogous to the subject sodium prospecting permits and their untimely applications for preference right leases. We feel that the action directed by the Bureau decision of October 16, 1969, is consistent with past Bureau practice in similar circumstances.

None of the arguments by American is persuasive that the Bureau decision of October 16, 1969, is in error. We adhere to that decision and hereby dismiss the protest of American.

The request for a hearing is denied inasmuch as it has not been shown that evidence would be presented which would warrant any different conclusions on the issues concerned in these cases.

The charge by American that some lands in N½ section 21, and E½E½ section 17, T. 26 S., R. 43 E., M.D.M., are being used for solar ponds without proper sanction by this Bureau has no material bearing on the disposition of the protest by American to the decision of October 16, 1969. While it is a fact that most of the N½ section 21, T. 26 S., R. 43 E., is included in the preference right lease application R 31, the E½E½ section 17, same township, is not included in any of the prospecting permits R 31, 34 or 35, nor in the applications for preference right leases under discussion.

American Potash & Chemical Corporation has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for lease application included in the appeal. If the appeal refers to all three lease applications involved, the total filing fee will be $15. The appellant must show wherein the decision appealed from is in error. If an appeal is taken, the adverse parties to be served are Mr. Lewis E. Hoffman, Attorney for Messrs. White, Kallerud and Winterbottom, Suite 717, 711 Fourteenth Street, N.W., Washington, D. C. 20005; and Mr. Roger Coley, Attorney for Occidental and SLCC, O'Melveny & Myers, Attorneys at Law, 611 West Sixth Street, Los Angeles, California 90017.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Thomas R. Cochran, Attorney for Protestant (Certified Mail)
Lonergan, Jordan & Gresham, Attorneys for Protestant (Certified Mail)
American Potash & Chemical Company
Lewis E. Hoffman, Attorney for White, Kallerud and Winterbottom
O'Melveny & Myers, Attorney for Occidental
William R. White
Mauritz J. Kallerud
Howard J. Winterbottom
Occidental Petroleum Corporation
200
300 (6)
GS, Cons Div. (18)
Gower Federal Service
Appeals List No. 1

Mining Claims: Discovery 3413

A mining claim is properly declared null and void where the evidence shows that no valuable discovery of mineral, such as would warrant a prudent man in the further expenditure of his labor and means in developing a valuable mine, **has** been made on the claim.

United States v. Gordon R. Cloes, Contest R-653 (California)(**February 25, 1970**)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1970 MAR 6 AM 10 00

In reply refer to:
142
Contest R-653 (California)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 25, 1970

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant :
:
v. :
:
Gordon R. Cloes, Contestee :

Involving End of the Rainbow Mine lode mining claim, situate in section 25, T. 16 S., R. 4 E., S.B.M., San Diego County, California, within the Cleveland National Forest

Decision Affirmed

Gordon A. Cloes has appealed from a decision of a Hearing Examiner dated November 10, 1969, which declared his End of the Rainbow Mine lode mining claim null and void for lack of a discovery of a valuable mineral deposit.

In his appeal, Cloes states that he intends to try to prove there are encouraging prospects of valuable minerals on the claim to satisfy a prudent person. He suggests that the Government's mineral examiner did find a few colors so he should not have reported the claim would not satisfy a prudent man's efforts and expense. He asks that he be given consideration for a patent under the Mining Claims Occupancy Act if his mining claim is finally denied.

This proceeding arose at the request of the Regional Forester, Forest Service, U. S. Department of Agriculture (San Francisco), through a contest complaint issued July 17, 1967, by the manager of the Riverside district and land office. Following denial of the charges in the complaint and after due process, a hearing was held April 11, 1969, at San Diego, California.

A basic requirement in the Department's appeals procedures is that where there is an adverse party in the case, and he is named in the decision being appealed, the appellant must serve a copy of the notice of appeal and of any subsequent statement of reasons upon the adverse party and must file proof of such service in the office to which appeal is taken. 43 CFR 1842.5-2, 1840.0-6(e). There is no evidence in the record that Cloes served a copy of his subsequent statement of reasons on the adverse party named in the Hearing Examiner's decision.

A second basic requirement is that the appellant must state the reasons for his appeal either in the notice of appeal or in a subsequent separate statement of reasons. 43 CFR 1842.5-1. Cloes gave no reason for appeal in his notice of appeal, and subsequently he has stated that he intends to try to prove there is a valuable mineral deposit on his claim, and that the Government's mineral examiner did find colors of gold on the claim so he should not have reported that it would not satisfy the prudent man rule. The Department has long held that an appeal which merely specifies as grounds of error that the decision has erroneously interpreted the law or that it is contrary to the law or facts or is not supported by the evidence, without any amplification, is insufficient. Duncan Miller, 65 I.D. 290 (1965); United States and Salt Lake City v. Wayne R. Watrous, A-27759 (May 15, 1959). See also United States v. Harold J. Geddis, A-31151 (August 19, 1969).

The penalty for not complying with either of these requirements is that the appeal is subject to summary dismissal. 43 CFR 1840.0-7. However, we have reviewed the record and find that the Hearing Examiner's decision held the appellant's claim, the End of the Rainbow Mine lode mining claim, to be invalid for lack of discovery of a valuable mineral deposit upon the basis of a comprehensive summary of the evidence submitted at a hearing and an adequate statement of the applicable law.

The decision below is affirmed.

Gordon R. Cloes has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is the Regional Attorney, Office of the General Counsel, U. S. Department of Agriculture, 630 Sansome Street, San Francisco, California 94111.

This decision will not be prejudicial to any application which Cloes may file in the Riverside district and land office under the Mining Claims Occupancy Act, 30 U.S.C. § 701 (Supp. IV, 1968).

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 3

DISTRIBUTION:
Gordon R. Cloes (Certified Mail)
Reg. Atty, OGC, USDA, San Francisco
Reg. Forester, FS, USDA, San Francisco
FS, Div Watershed Mgmnt, USDA, Wash, D.C. (12)
Gower Federal Service
Appeals List No. 1
200
300 (6)

665-D

RECEIVED
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CALIF. STATE OFFICE
SACRAMENTO, CALIF.

UNITED STATES
v.
LESTER E. MARTIN ET AL.

A-31050 Decided APR 3 1970 3 6

Mining Claims: Generally--Mining Claims: Determination of Validity
Mining Claims: Possessory Right

Under the mining laws of the United States one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the locator must show that he has made a discovery of a valuable mineral deposit within the limits of the claim in order to retain his possession.

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

Mining Claims: Discovery: Marketability

It is not necessary to show that minerals have actually been sold in order to satisfy the requirements of discovery on a placer mining claim located for deposits of clay or building stone on land since closed to mining location, but it must be shown that the material on the claim could have been extracted, removed, and marketed at a profit prior to the time that the land was closed to operation of the mining laws.

Mining Claims: Mill Sites

No right to a mill site, upon which there is no quartz mill or reduction works, can be established unless the site is used for mining or milling purposes in connection with a valid lode claim.

Administrative Practice--Rules of Practice: Hearings

It is not an abuse of discretion for a hearing examiner to deny a second continuance of a hearing to permit a mining claimant to have his claims examined by a mining expert after the time allowed under a previous continuance has expired without any apparent effort on the part of the claimant to secure the examination, and there is no abuse of discretion on the part of a hearing examiner in failing to order a prehearing conference where none is requested.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-31050

United States
v.
Lester E. Martin et al.

: Los Angeles Contests
: Nos. 0170969-C-40, 41,
: 43 and 44

: Mining claims declared
: null and void

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lester E. Martin and others [1] have appealed to the Secretary of the Interior from a decision dated August 2, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the North Star, North Star No. 1, Gold Hill and Gold Hill Nos. 1 and 2, and Condor Nos. 2 and 3 lode mining claims and the Beautifier and White Flagstone Quarry placer mining claims in San Bernardino County, California.

The record shows that the North Star and North Star No. 1 claims, in secs. 21, 22 and 27, T. 30 S., R. 47 E., S.B.M., were located by Lester Martin and J. A. Tinsley, Sr., on August 16, 1937, that the Gold Hill and Gold Hill No. 1 claims were located by Martin on October 14, 1934, and the Gold Hill No. 2 claim on May 18, 1935, all in secs. 21 and 22, T. 30 S., R. 47 E., that the Condor Nos. 2 and 3 claims, in sec. 33, T. 25 S., R. 45 E., were located by Martin, Tinsley and Howard F. Smith on June 11, 1938, and that the Beautifier claim, in T. 28 S., R. 47 E., was located by Martin and Tinsley on August 9, 1939 (Exs. 1-8). The White Flagstone Quarry claim, also in T. 28 S., R. 47 E., apparently was never recorded (Tr. 10). The claims are all within an area in which, according to the record, the Department of the Navy has condemned a leasehold estate in the claimants' possessory interest in connection with its Mojave "B" gunnery range, and, at all times since September 2, 1943, the lands embraced in the claims have been under the jurisdiction of the Navy Department.

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[1] Lester E. Martin, J. A. Tinsley, Jr., heirs and devisees of J. A. Tinsley, Sr., and "unknown owners" were named as contestees in contest No. Los Angeles 0170969-C-43. Martin was named as the sole contestee in the other three contests which are included in these proceedings.

On March 23, 1964, a contest complaint (Los Angeles 0170969-C-40) was filed in the Riverside, California, land office against the North Star and North Star No. 1 claims, and, on March 26, 1964, complaints were filed against the Gold Hill and Gold Hill Nos. 1 and 2 claims (Los Angeles 0170969-C-41) and the Beautifier and White Flagstone Quarry claims (Los Angeles 0170969-C-43). On April 15, 1964, a complaint was filed against the Condor Nos. 2 and 3 claims (Los Angeles 0170969-C-44). In each of the complaints it was charged that:

(1) The land embraced within the claims is non-mineral in character; and

(2) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

In addition, it was charged in contest No. Los Angeles 0170969-C-43 that:

(3) No discovery of a valuable mineral or material has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit; and

(4) It has not been shown that there exists an actual and substantial market for these materials.

The four actions were consolidated in a single proceeding, and a hearing was held at Los Angeles, California, on May 21 and 25, 1965, 2/ at which Edward F. Cruskie, a mining engineer employed by the Bureau of Land Management, testified in behalf of the contestant and appellant Lester E. Martin testified in behalf of the contestees.

2/ The matter was initially set for hearing on January 14, 1965. By letter dated December 24, 1964, counsel for the contestees requested "a continuance until June of 1965 so that we may go out with our own geologist and take assays at the sites involved," adding that neither he nor his client had until then had the funds to pay a geologist. By order dated December 29, 1964, the hearing was postponed indefinitely, and by a notice of March 23, 1965, it was rescheduled for May 21, 1965. By letter dated May 4, 1965, counsel requested "that the matter be taken off calendar," stating that he and his clients had not had the money or the opportunity to visit the mining claims and that, until that was done, he did not feelthat he could adequately represent the contestees. By letter dated May 7, 1965, the hearing examiner denied the request "for the reasons that good cause has not been shown and that a copy of your request has not been served on counsel for the contestant."

At the outset of the hearing, counsel for the appellants requested a continuance of the case, "based primarily on lack of funds with which to employ a mining engineer" and on a letter dated March 30, 1962, addressed to the "Chief Counsel, Land Office Division, Los Angeles, California", in which a request was made for permission to go upon and examine the mining claims (Tr. 5-6). After ascertaining that the 1962 request was not pursued beyond the making of it and that no attempt was made to get permission to go upon the claims after the contest complaint was filed in March 1964, the hearing examiner denied the motion for continuance, finding that appellants had had ample opportunity to make arrangements to get on the claims (Tr. 6-10).

Cruskie testified that he examined the Condor No. 2 and 3 claims with Martin on October 13, 1960, that, again with Martin, he examined the other contested claims on October 7, 1961, and that he visited the Gold Hill group of claims again on June 27, 1964, after Martin had stated in his answer to the contest complaint that those claims were valuable for metallic minerals other than gold and silver, taking four samples at that time (Tr. 14, 30). Cruskie submitted in evidence the results of assay tests on twenty samples taken from the lode claims which showed combined gold and silver values ranging from $.21 per ton of material to $8.97 and insignificant quantities [3] of other metallics (Tr. 27-46; Exs. 16-22). Only three samples, one from the North Star claim which assayed at $8.97 per ton in gold and silver (Ex. 16) and two from the Gold Hill No. 2 claim which assayed at $2.74 and $6.74, respectively, in gold and silver (Ex. 17), showed values exceeding $2.00 per ton, and more than half (twelve) of the samples showed gold and silver values of less than $1.00 per ton.

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[3] One sample taken from the Gold Hill No. 2 claim in 1964 was found to contain .76 per cent zinc (Ex. 19), while the remaining samples taken on that date showed a zinc content of .57 per cent or less, a copper content of .02 per cent or less, and a trace of lead (Exs. 20-22). Other samples showed a molybdenum trioxide content not exceeding .03 per cent, a vanadium pentoxide content not exceeding .01 per cent, a uranium oxide content of .004 per cent, or less, and no more than a trace of tungstic oxide (Exs. 17 and 18).

The mineral deposit on the White Flagstone Quarry claim was described by the witness as consisting of an arkosic sandstone bed about 20 feet thick, while that on the Beautifier claim was described as a softened clay zone of the same arkosic sandstone beds (Tr. 18-19). Cruskie observed shallow workings on all of the claims except the White Flagstone Quarry (Tr. 19-20).

In Cruskie's opinion, the materials found on the Beautifier and White Flagstone Quarry claims are minerals of widespread occurrence for which there was no market either in 1943 or at the time of the hearing, and the fissures on the lode claims are tight and narrow, and the vein filling of extremely low grade, so that there is an extremely pockety condition in the mineralization. While he felt that one sample from the North Star claim would warrant "a little exploration" he could not "see that any of these samples, even this particular one, indicates that there's any ore chute possibility in any of these veins" (Tr. 59-62).

Martin testified on behalf of the contestees that he sold two tons of ore from the Gold Hill No. 2 claim to the Diak mill in Dagget, California, about 1936, receiving $94 for the first ton and $110 for the second, after milling and hauling expenses, and that his son dug a third ton of ore from the same claim which was also taken to the Diak mill and an additional one-half ton which was taken by Martin's daughter-in-law to Burton Bros. in Rosemont, California, for which a $20 deposit was paid (Tr. 120-125, 159, 161-163; Ex. 13). 4/ He stated that one ton of ore was removed from the Gold Hill claim

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4/ Martin was not always clear or consistent in his testimony with respect to the work performed on the claims. Initially, for example, he stated that the $3\frac{1}{2}$ tons of ore which were sold were taken from the Gold Hill No. 2 claim and that one ton of ore, which was milled at appellants' own mill and which was assayed at $24 per ton, was removed from a site on the sideline dividing the Gold Hill and Gold Hill No. 2 claims, the biggest portion lying within the Gold Hill claim, and he identified the points from which the ore was removed on a map of the claims (Tr. 120-125, 129-130; Ex. 13). On cross-examination, however, Martin indicated that the $3\frac{1}{2}$ tons of ore which were sold were removed from the Gold Hill claim and that one ton of ore, which was not milled or sold, was mined from the Gold Hill No. 2 claim (Tr. 159-160). There is also some question as to exactly where on the claims the sample was taken which allegedly was assayed in 1937 at $24 per ton (Tr. 130, 168-169). Moreover, Martin decided that the $3\frac{1}{2}$ tons of ore were sold in 1936 only after he had stated that he didn't remember when the removal and shipment of the ore occurred (Tr. 161-163).

and that approximately 5 tons of ore were removed from the North Star claims but not sold, that two samples taken from the North Star claim had assay values of $10.80 and $12.20 per ton, respectively, and that assays of ore from the North Star No. 1 claim averaged $8.40 per ton (Tr. 128-129, 135-137, 158-159, 160-161, 171-172; Ex. 12). Martin also stated, without clearly indicating which claim he was talking about, that the ore "runs $14.50 a ton" (Tr. 128), and he reported an assay value of $4 per ton on material removed from the northern part of the Gold Hill No. 2 claim (Tr. 130-131).

According to Martin, the width of the vein at the point where the 3½ tons of ore were removed from the Gold Hill No. 2 claim was 8 to 12 inches at the time when the ore was removed but had narrowed down to 2½ to 4 inches (Tr. 163-164); another vein, which started with a width of a foot, narrowed down to about 4 inches over a distance of about 8 feet (Tr. 169). Martin said that the gold values seemed to increase with depth but that the veins became narrower; he estimated that a 4-inch vein could be profitably mined if it averaged $100 per ton in mineral values (Tr. 164). He testified that approximately 2 feet of rock obscured a 3- or 4-inch vein at the bottom of one of the discovery pits on the Gold Hill No. 2 claim at the time of Cruskie's examination (Tr. 127) and that 12 to 16 inches of rock covered the bottom of the trench which Cruskie examined on the North Star claim (Tr. 138).

Martin also reported the panning of between 21 and 30 yards of placer material from the northern part of the Gold Hill No. 2 claim in 1938 or 1939, which, he stated, yielded gold values of about $2.80 per yard (Tr. 131-132, 166-167, 179-181).

According to his testimony, Martin lived on the Condor claims for three years while working on the mining claims, the Condor No. 2 having been located as a cabin site and the Condor No. 3 to develop water for the mill appellants intended to erect upon it, and no discovery work was performed on those claims other than the digging of a water tunnel and trench (Tr. 143-148).

With respect to the two placer claims, Martin testified that he had taken home samples of clay from the Beautifier claim and

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Footnote 4/Continued:

Nevertheless, he was consistent in his testimony that 3½ tons of ore from the Gold Hill group of claims were sold and that a sample of ore from the claims, assayed in 1937, had a gold and silver value of $24 per ton of ore.

conducted water absorption tests. He had, however, made no other tests of the material and had no knowledge of its chemical properties, and he had made no attempt to sell any of the material (Tr. 148-153, 174-176). Similarly, he had not attempted to sell any material from the White Flagstone Quarry claim and did not know the chemical composition of the material. The material on that claim, he stated, was a white flagstone which could easily be quarried in slabs of 2 to 4 inches in thickness, with lengths of 4 to 8 feet and widths of 4 feet, which could be used for any decorative purpose. Martin did not have any idea of the market value of the stone or that of other stone used for the same purposes, and he said that he had seen no comparable stone in any rock yards (Tr. 154-156).

The hearing examiner found from the evidence that no part of the deposits of decorative building stone or clay exposed on the placer mining claims had ever been extracted, removed, or marketed at a profit and that, in the absence of any evidence of the sale or bona fide development of the deposits or of the existence of a demand for the materials, it must be concluded that the materials were not marketable as of September 1943, and he determined that the deposits of clay and building stone were not valuable mineral deposits within the meaning of the mining laws.

With respect to the lode claims, the hearing examiner found the testimony of the Government's witness sufficient to establish, prima facie, that a valuable mineral deposit had not been exposed on any of the lode claims, and he found that:

> "The testimony of the contestees' witness indicates that some ore was shipped from the Gold Hill claims in 1936. However, the witness indicated that one of the veins from which the ore was removed had narrowed to a width of 4 inches or less. All of his testimony with respect to the ore shipments and alleged assay values was from memory and not supported by any documentary evidence whatever. The said testimony, unsupported by any documentary evidence, is insufficient to overcome the *prima facie* case established by the contestant. The contestees have not identified a single vein exposed on any of the lode claims, bearing sufficient mineral values, and occurring in such width and lateral extent, as to warrant development."

From these findings the hearing examiner concluded that no probative evidence had been offered of the existence of any specific vein or lode of mineralized rock in place, exposed on any of the claims, which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

In appealing to the Director, Bureau of Land Management, from the hearing examiner's determination, appellants asserted that they had repeatedly requested permission to have an expert go on and examine the claims and that they had never had a full opportunity to investigate and examine the claims with an expert. They conceded that no testimony was given as to the value of the White Flagstone Quarry claim or the Condor Nos. 2 and 3 claims, except that the Condor No. 2 was occupied as a cabin site and the Condor No. 3 as a mill site. Nevertheless, they argued that the Condor No. 3 claim should have been held valid as a mill site because the land was nonmineral in character and noncontiguous to a lode and because work had been expended in justification of milling and mining, that a possessory right in the Condor No. 2 should have been recognized, and that a continuance should have been granted to permit expert testimony to be procured with respect to the White Flagstone Quarry claim. They further contended that a $9 mineral sample in 1943 would have been equivalent to a $30 value in the current economy, that the mineral sample values therefore should have been multiplied by three to determine their value in terms of the 1943 economy, that Martin actually lived on the claims and could have made a living from them, that the hearing examiner erred in recognizing a different test of discovery in a contest between the Government and a mining claimant from that applicable in contests between rival claimants, that the appellants should not be required to meet the requirements for patent but should have been allowed to hold the claims while patent was denied, that the Government's witness admitted the present commercial value of the material on the Beautifier claim and that the burden was therefore on the Government to show that the material was not valuable in 1943.

In its decision of August 2, 1968, the Office of Appeals and Hearings found that the record clearly showed that there had been no discovery of valuable minerals within the meaning of the mining laws on any of the claims. It was clear from the record, it stated, that no materials were sold from the placer claims, and those claims were, therefore, null and void. It also found that the hearing examiner had properly concluded that there was no exposure of a valuable lode deposit on any of the lode claims. The use of one of

the claims as a cabin site and the intended use of another as a mill site, it further determined, could not validate those claims. The Office of Appeals and Hearings found the argument that the reported mineral values should be multiplied by three to be unsupportable, and it concluded that, in the circumstances indicated, the hearing examiner did not abuse his discretion in refusing to grant a continuance to permit appellants to have an expert examine the claims.

In their appeal to the Secretary, appellants argue, in substance, that:

(1) There was apparently deliberate suppression of appraisals made in connection with the determination of compensation in the condemnation proceedings brought against the lands in the United States district court;

(2) No real consideration was given to the fact that the Government interrupted Martin's normal development and discovery process and excluded him from access to his property for almost a quarter of a century, and war emergency condemnation cases involving mining claims should be given special consideration under different rules from those normally applied in mining claim contests;

(3) The evidence does not support the determination that there was no discovery of a valuable mineral deposit on any of the lode claims;

(4) There was no basis for declaring the Beautifier and White Flagstone Quarry placer claims null and void;

(5) The Condor Nos. 2 and 3 lode claims were not conceded by appellants to be invalid and were not properly so declared;

(6) If the Condor Nos. 2 and 3 claims are not found to be valid, a 5-acre portion of the Condor No. 2, including the cabin site, and a 5-acre portion of the Condor No. 3 should be recognized as a valid mill site;

(7) The hearing examiner abused his discretion in failing to hold a pretrial conference for the purpose of narrowing the issues.

Appellants' arguments are inconsistent in some respects and lack merit in others. If, for example, there is any merit in appellants' assertion that "Mr. Martin was prevented from perfecting his location of the mining claims by reason of the eviction by the condemnation action brought by the Government", there cannot possibly be any basis for finding that Martin did, in fact, perfect his mining locations by the discovery, prior to September 2, 1943, of valuable mineral deposits on each of the claims in question. Similarly, if the mineral values found on the Condor Nos. 2 and 3 claims are sufficient to warrant recognition of the discovery of valuable mineral deposits on those claims, the lands in the claims are not subject to disposition as a mill site, inasmuch as the law provides that only nonmineral lands may be included in an application for patent to a mill site (30 U.S.C. § 42 (1964)).

We find no merit in appellants' contention that "there was apparently deliberate suppression of appraisals made in connection with compensation for the taking in United States District Court actions Nos. 3129-PH and 769-60-PH and currently 65-1008-IH." Appellants have not attempted, either in their current appeal or in their earlier arguments, to show that any evidence was developed in connection with the condemnation proceedings which would have tended to show that there was a discovery on any of the claims in question prior to 1943. At the hearing it was disclosed that the Condor Nos. 1 and 4 claims, which are not involved in this proceeding, were examined "by Mr. /Val/ Payne in 1949" (Tr. 33). The record does not show, however, that the claims which are involved were examined at that time, and no attempt was made at the hearing to have the report of the 1949 examination introduced as evidence. Moreover, although appellants now seem to attach some significance to the fact that the "1949 report of Val Payne, a valuation engineer of the Bureau of Land Management, was not presented to the Hearing Officer even though there was an admission that an examination was made by Mr. Payne of the Condor's /sic/ No. 1 and No. 2 /sic/ mining claims," they do not show what that significance is.

Appellants' contention that they were prevented by governmental action from perfecting their mining locations is virtually the same argument that was advanced by the mining claimant in United States v. Frank Coston, A-30835 (February 23, 1968), a case involving mining claims in the same gunnery range which were affected by the same condemnation proceedings with which we are concerned here. In response to the argument in that case we stated that:

> "* * * All public lands, unless withdrawn or otherwise closed to mineral entry, are open to exploration and appropriation under the mining laws of the United States, and an individual may take possession of vacant public land open to location and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals. However, no rights against the Government are established under a mining claim except upon the discovery of a valuable mineral deposit within the limits of the claim, and, when the Government withdraws its consent to mining location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the mining claimant must show that he made a discovery of a valuable mineral deposit prior to such withdrawal of consent in order to retain his possession. /Citations omitted./
>
> "It is not disputed that appellant has been prevented by governmental action from taking any steps since 1943 either to develop a mine or to explore for minerals on the claims in question. The question which must be determined here, however, is simply whether or not he has established any rights against the United States by virtue of a discovery of a valuable mineral deposit. If he has not, it is immaterial that he may have been prevented from making a discovery by action of the Government. /Footnote omitted./ Since a mining claimant acquires no rights against the United States prior to making a discovery, he cannot be heard to complain if the United States removes the land from further operation of the mining laws before he makes a discovery. * * *"

The real issues presented in this appeal, then, are:

(1) Does the evidence warrant a finding that there was a discovery of a valuable mineral deposit on any of the claims in question prior to September 2, 1943?

(2) If not, was appellants' failure to present evidence which would have sustained that finding the result of rulings by the hearing examiner which unduly limited appellants' opportunity to develop evidence of mineral discoveries?

(3) Is there, in any event, a basis for recognizing a valid mill site claim on the Condor No. 2 or the Condor No. 3 claim?

In challenging the finding that the evidence of record does not show a discovery on any of the lode claims, appellants rely on two major propositions, first, that the mining claimant was unjustly deemed to have no credibility and, second, that evidence of mining costs, without which gold values mean nothing, was not developed at the hearing.

Although the hearing examiner did expressly point out that Martin's testimony with respect to ore shipments and assay values was based wholly upon memory, unsupported by any documentary evidence whatever, and although we now find it impossible to review that testimony without entertaining some question as to the reliability of Martin's memory, the credibility of his testimony is not truly an issue. Rather, it is the significance of that testimony which is at issue. Assuming that Martin's recollection of the quantity of ore sold, of the amount received for such ore, and of the assay values of samples taken from the claims is accurate, that one ton of ore was sold for $110 and another for $94, that samples of ore from the claims showed assay values ranging from $4 to $24 per ton, wherein would this evidence justify a man of ordinary prudence in the further expenditure of his means in an attempt to develop a valuable mine?

Appellants are undoubtedly correct, as this Department has pointed out on numerous occasions, in stating that gold values, standing alone, have no meaning. They are not so correct in asserting that no evidence was introduced with respect to mining costs. The Government's witness, Cruskie, stated that, "if you maintain a six-foot width of $8.40 gold, before World War II, and you had a length of it of 1,500 foot and some depth to it, you would have a proposition if you had a mill close by that would mill it around $4 a ton that you could make expenses and hope that maybe it would jump up to $10 or $15 a ton for you and make some money" (Tr. 40). Martin testified that you could mine a 4-inch vein "if it runs $100 a ton" (Tr. 164). But where is the 4-inch vein of $100-a-ton ore or the 6-foot vein of $8.40-a-ton ore? Apart from the 2 tons of ore allegedly belonging to the $100 class, Martin did not claim to have found any other ore with more than a fraction of that value, and, although he reported several samples of ore exceeding $8.40 per ton in mineral value, no evidence was offered that such values were ever found on the claims

in a quantity which would justify an attempt to mine the ore. 5/

In the Coston case, supra, we stated:

> "* * * In contemplating the removal of ore from a vein buried in the earth, * * * it will obviously be necessary to have some estimate of the extent and quality of the ore body before it can be determined that the commencement of mining operations is economically justifiable. Thus, where a vein bearing ore of a minable quality has been found, geological inference may be relied upon to establish its extent and its likely potential value, but, where the quality of the vein exposed is erratic or uncertain, the quantity of the material contained therein is meaningless, and there is no basis for a reasonable estimate of its value. /Citation omitted./
>
> "The basic problem here lies in the failure of the claimant to establish the quality of any ore the quantity of which may be estimated. Appellant's expert witness believed that there are many thousands of tons of ore in the claim richer than the best sample thus far obtained, but he could not give any estimate as to the quantity of $18.20-a-ton ore or of any other quality ore that may be contained in the exposed veins."

The same problem is found here, aggravated by the fact that in this case there is not even a guess as to the quantity of ore of any quality that may be found on the claims. All that we have is the unsubstantiated hope of a mining claimant that pursuit of the exposed veins on the claims will disclose richer ore, and, viewed most optimistically, the evidence shows no more than a possibility that further exploration may disclose the existence of valuable mineral deposits somewhere on the claims. Such a showing does not constitute a discovery. United States v. Ford M. Converse, 72 I.D. 141 (1965), aff'd in Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

5/ Martin's testimony suggests that the high value ore may have largely been mined out. He said the first ton of the 3½ tons removed from the Gold Hill No. 2 was taken from a shaft, then when the ore chute ran out the second ton was taken from a new shaft. The third ton was taken from deeper in the second shaft and the remaining half ton from that shaft. (Tr. 121-124) This is the shaft in which Martin said that the vein narrowed down to 2½ to 4 inches wide.

With respect to the Beautifier and White Flagstone Quarry claims, the Office of Appeals and Hearings seemingly found the fact that no material had been sold from either of the claims sufficient in itself to show that there was no market for the materials found thereon in 1943. The Department, in fact, has never held proof of the actual sale of minerals from a mining claim to be an indispensable element in establishing the marketability of those minerals. See United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969), and cases cited. 6/ It has, however, long required, with respect to nonmetallic minerals of widespread occurrence, and some metallics as well, a showing that material from a particular mining claim could have been mined and marketed at a profit at the time as of which the validity of the claim is to be determined. See, e.g., United States v. Gene DeZan et al., A-30515 (July 1, 1968), and cases cited; United States v. Warren E. Wurts and James E. Harmon, 76 I.D. 6 (1969). This so-called "marketability test" was approved by the Supreme Court in United States v. Coleman, 390 U.S. 599 (1968). Contrary to appellants' contention that "Coleman also contemplates that a prudent man might anticipate the development of a special market for his material to give vitality to his discovery," the Department has consistently held that a prospective market, in the sense of a market to be developed in the future, is not sufficient to establish the validity of a mining claim presently under attack. See, e.g., United States v. Everett Foster et al., 65 I.D. 1 (1958), aff'd in Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. William M. Hinde et al., A-30634 (July 9, 1968); United States v. W. S. Pekovich, A-30868 (September 27, 1968).

Appellants' attempt to convert evidence that the clay found on the Beautifier claim can be used in the preparation of rotary mud (Ex. A; Tr. 84) and that, with treatment, it can be made activable so as to be useful in oil filtration or similar processes (Exs. B and C; Tr. 90, 95-98) into evidence that the material is commercially valuable for those purposes is unfounded. The evidence goes only to the question of whether or not the material on the claim can be used for any of the purposes for which it is purported to have value. Assuming that material of the nature of that found on the Beautifier claim can be used in all of the industries enumerated at the hearing,

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6/ The Department's decision in the Barrows case has been challenged in an action entitled Esther Barrows v. Walter J. Hickel, Civil No. 70-215-OC, in the United States District Court for the Central District of California.

it must still be shown that, by virtue of its quality, its proximity to market and the cost of its extraction, the material found on the claim possesses advantages over other materials used by those industries which would have enabled it, in 1943, to compete successfully in the market with those other materials. The only evidence bearing upon this question was Cruskie's testimony that there was not, either in 1943 or at the time of the hearing, a market for the material.

Turning then to the question of whether appellants were unduly restricted in their opportunity to develop evidence of the validity of their claims, it appears that, although appellants initially asked for a continuance of their case until they could have the claim examined by a competent expert, they now argue that the hearing examiner abused his discretion in failing to hold a pretrial conference for the purpose of narrowing the issues. The argument is void of merit. The Department's regulations do provide that a hearing examiner may, in his discretion, order a prehearing conference to consider, among other things, agreements to the introduction of documents, as well as any other matters which may aid in the disposition of a proceeding (43 CFR 1851.1(a)). Such a conference is not ordered as a matter of course and, as a matter of practice, is not ordered at all unless it is expressly requested by one of the parties to a contest or the hearing examiner determines on his own that it would aid in simplifying the presentation of evidence at the hearing which it is to precede. The record does not show that appellants ever suggested a prehearing conference until they argued in their appeal to the Secretary that such a conference would have given their attorney "an opportunity to use the processes of the Department as well as of the United States District Court in compelling the production of this vital material." Even here, as we have previously pointed out, they have made no attempt to show that the material, the production of which they seemingly would seek to compel, is vital, or even relevant, to the proper disposition of the issues before us. Irrespective of the relevance of the material, a hearing examiner cannot abuse his discretion in failing to grant a motion which is not made.

We find the record equally persuasive that the hearing examiner did not abuse his discretion in denying appellants' request for a second continuance after a previous request had been granted and the time allowed thereunder had expired without any apparent attempt on the part of appellants to accomplish the acts allegedly required for the preparation of a proper defense of the claims.

In requesting on May 4, 1965, "that the matter be taken off calendar", appellants, in effect, simply asked the Government to suspend indefinitely the charges stated in the complaints. No grounds whatever have been shown for such action.

It is undoubtedly true that the restrictions which attended the Government's use of the lands involved in this proceeding, coupled with the passage of nearly a quarter of a century between the termination of appellants' access to the claims and the time of the hearing, resulted in problems in attempting to substantiate the mineral values claimed. However, this cannot excuse appellants from the requirement of showing, before recognition can be made of rights superior to those of the United States, that they did discover a valuable mineral deposit on each of the claims in question. As we pointed out in the Barrows case, supra, once the Government has made a prima facie showing that a mining claim is invalid, the claimant has the burden of showing by a preponderance of the evidence that his claim is valid, and he cannot meet this burden by failing to keep adequate records or other means of proof or avoid it by showing that the records which he did keep have been lost or destroyed.

In short, then, we cannot conclude from appellants' showing that they were denied an opportunity to develop properly the evidence of the value of their claims in 1943 as mining property or that they have established any basis for supposing that a grant of additional time of any duration would enable them to make the showing that would be required to overcome the evidence that there was no discovery on the claims prior to September 2, 1943.

Turning finally to the question of the alleged rights in the Condor Nos. 2 and 3 claims as a mill site, we find, without determining whether or not a valid mill site claim can be made on land which has been located as a mining claim and without attempting to ascertain whether or not the lands in those claims are, in fact, nonmineral lands, that appellants have not shown a basis for recognizing the establishment of any rights in a mill site.

Rev. Stat. § 2337, 30 U.S.C. § 42 (1964), permits the acquisition of title to nonmineral land in connection with mining activity in two situations:

(1) Nonmineral land, not exceeding 5 acres, which is not contiguous to a vein or lode and which is used by the proprietor of a vein or lode for mining or milling purposes may be included in an application for a patent of the vein or lode; and

> (2) The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site.

The record does not indicate that a quartz mill or reduction works was ever erected on either the Condor No. 2 or the Condor No. 3 claim, and the second provision of the statute clearly is not applicable.

As we have seen, appellants base their claim of right to a mill site upon Martin's use of a portion of the Condor No. 2 claim as a cabin site and upon the development of a source of water on the Condor No. 3 claim which appellants intended to use for a mill which they intended to put on the claim. The Department has, of course, recognized the sinking of wells and the construction of substantial improvements for the conveyance and utilization of water therefrom for use in mining operations as satisfying the requirements for a mill site. Howard C. Brown, 73 I.D. 172 (1966), and cases cited. It has also held that the use of land as the site of living quarters for workmen employed in a mill is justification for the allowance of a mill site entry (Satisfaction Extension Mill Site, 14 L.D. 173 (1892)) and that the use of a mill site as the location of a blacksmith shop and tool house, utilized in connection with a mining operation, is within the contemplation of the statute (Alaska Mildred Gold Mining Co., 42 L.D. 255 (1913)). However, under the first clause of the statute, there can be no mill site unless there is a valid lode claim to which it is appurtenant. Union Phosphate Company, 43 L. D. 548 (1915); United States v. Dawson, 58 I.D. 670, 679 (1944); United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964); United States v. Jesse W. Crawford, A-30820 (January 29, 1968). Moreover, the naked possession of water on a mill site location which has not been improved or used or occupied for a mining or milling purpose, or the use of a cabin as a base of operations while engaged in prospecting activities, or the intent to use land in the future as the site of a mill or the site of living quarters or other structures to be utilized in connection with the operation of a mine or mill, is not enough to validate a mill site location. See United States v. S.M.P. Mining Company, 67 I.D. 141 (1960); United States v. Gilbert C. Wedertz, 71 I.D. 368 (1964); United States v. W. E. Polk, A-30859 (April 17, 1968).

Apart from the fact that appellants have not shown that the land they now claim as a mill site was ever used in connection with

mining operations on a valid lode claim, 7/ the limited use of that land attested to by Martin was not of the nature contemplated in a mill site entry. Accordingly, recognition of appellants' rights to a mill site on either the Condor No. 2 or No. 3 claim was properly denied, and, upon review of the entire record, we find no error in the failure of the hearing examiner and the Office of Appeals and Hearings to find that rights had vested in appellants in any of the claims in question under any provision of the mining laws.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed for the reasons stated herein.

Ernest F. Hom
Ernest F. Hom
Assistant Solicitor
Land Appeals

7/ Martin, in fact, testified that he had leased 40 acres from the State for use as a mill site in connection with operations on the North Star and Gold Hill claims (Tr. 117). This mill site was $2\frac{1}{4}$ miles from the North Star claims and $3\frac{1}{2}$ miles from the Gold Hill claims whereas it was 49 miles from the Condor claims (Tr. 117, 119, 120). Martin had a small mill presumably on the State mill site which was intended to be used first for developing the North Star and Gold Hill claims and then "eventually" moved to the Condor No. 3 for use apparently on other Condor claims which are not in issue (Tr. 117-118, 148).

665-D

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PACIFIC COAST GASOLINE COMPANY

A-31120 Decided APR 17 1970 3 9

Mining Claims: Lands Subject to--Mining Claims: Power Site Lands--Equitable Adjudication: Substantial Compliance

The equitable adjudication authority of the Secretary of the Interior does not extend to the validating and patenting of a placer mining claim located on land included in a powersite classification since there cannot be substantial compliance with the mining laws in the case of claims located on land withdrawn from mining location.

Mining Claims: Mill Sites

The location of land for a millsite to be used in conjunction with a placer mining claim was not authorized until enactment of the act of March 18, 1960.

March 3, 1849

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-31120

: R-1478

Pacific Coast Gasoline Company : Application for mineral
: patent rejected

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Pacific Coast Gasoline Company has appealed to the Secretary of the Interior from a decision dated January 30, 1969, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Riverside district and land office, dated October 29, 1968, declaring appellant's Dial and Skinner Sand Pit #1 placer mining claim and its Dial and Skinner Sand and Rock Plant millsite claim null and void and rejecting its application for patent to those claims.

The claims were held to be invalid on the ground that they were located on July 27, 1953, for land in lot 4, sec. 4, T. 8 N., R. 23 E., S.B.M., which had been included in Power Site Classification No. 55 on June 22, 1923, and was thus not open to mining location until August 11, 1955, when the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-625 (1964) was passed.

Appellant does not question the ruling that the land was withdrawn from mining location when its claims were located. The claims were therefore invalid. Leslie G. and Rita M. Folwell, A-31104 (August 18, 1969), and cases therein cited.

Appellant asks, however, that its claims be recognized in accordance with equitable principles and that they be patented under the equitable adjudication provisions of 43 U.S.C. § 1161 (1964). Appellant asserts that it and its predecessors, in the good faith belief that the claims were valid, have spent thousands of dollars in developing them, appellant's immediate predecessor having alone made a capital expenditure of more than $75,000. Appellant states that it first learned of the withdrawal of the land when the land office decision was issued on October 29, 1968, that at that time the claims

had been worked and developed for more than 15 years, and that only 2 of the 15 years represented the time when the lands were not open to mining and millsite location since the lands were restored to location by the act of August 11, 1955, supra.

The statute that appellant would invoke authorizes the Secretary

> "to decide upon principles of equity and justice, as recognized in courts of equity, * * * all cases of suspended entries of public lands * * * and to adjudge in what cases patents shall issue upon the same." 43 U.S.C. § 1161 (1964).

It is further provided that this statute shall be applicable to

> "all cases of suspended entries and locations * * * where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained * * *." 43 U.S.C. § 1164 (1964).

The critical prerequisite for eligibility to relief under the statute is substantial compliance with the law. The question here is whether substantial compliance or any compliance can be found in the case of a mining claim which is located on withdrawn land. We think not. In Hawley v. Diller, 178 U.S. 476 (1900), the Supreme Court said that the purpose of the statute was

> "to authorize the confirmation of entries which otherwise the land officers would be compelled to reject because of errors or informalities which, if satisfactorily explained as arising from ignorance, accident or mistake, would, in the absence of an adverse claim, be excused by the courts, in administering the principles of equity and justice". (P. 493.)

We do not believe that a court could disregard the "error" or "informality" of locating a claim on withdrawn land and order the issuance of a patent for such a claim, even if all requirements such as discovery and the marking of boundaries had been met.

As otherwise expressed by this Department, with the concurrence of the Attorney General,

> "the province of the board of equitable adjudication is confined to entries so far complete in themselves, that, when the defects on which they are submitted have been cured by its favorable action they pass at once to patent." James H. Taylor, 9 L.D. 230, 231 (1889); James C. Forsling, 56 I.D. 281, 285 (1938).

The defect in appellant's claims is that they were located on land which at the time of location was withdrawn from mining location by section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1964). It is inconceivable that the equitable adjudication statute could be interpreted as empowering the Department to cure this defect, which would amount to restoring the land from the withdrawal nunc pro tunc to validate the locations as of the time when they were made. As appellant recognizes, it took an act of Congress, the act of August 11, 1955, supra, to accomplish this result and then only prospectively from that date. 1/ Leslie G. and Rita M. Folwell, supra.

In this connection, although we need not rule on it, we note appellant's assertion that only 2 of the 15 years after the claims were located represented time when the land in the claims was not open to location. We have just observed (in footnote 1) that this is not true as to the millsite. It probably also is not true as to the placer claim. The Office of Appeals and Hearings mentioned that appellant's placer claim was located for sand and gravel and that section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), removed common varieties of sand and gravel from location under the mining laws. Appellant's patent application does not suggest that the sand and gravel in the claim is otherwise than a common variety of such material and appellant's appeal makes no assertion to the contrary. If in fact the sand and gravel is a common variety it never became subject to location upon passage of the Mining Claims Rights Restoration Act of August 11, 1955, because the intervening act of July 23, 1955, removed it from location.

1/ This is true only as to the placer mining claim. As to the millsite, authority to locate land for a millsite to be used in conjunction with a placer, as distinguished from a lode, claim was not provided for until passage of the act of March 18, 1960, 30 U.S.C. § 42(b) (1964).

Thus there would have been no period of time in which the placer claim properly could have been located.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F. R. 1348), the decision appealed from is affirmed.

Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
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Mining Claims: Discovery 3413

To constitute a valid discovery on a placer mining claim it must be shown that minerals have been found within the limits of the claim in such quality and of such quantity as to warrant a man of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; where a claim contains deposits with negligible gold values or deposits with somewhat better gold values which are very limited in quantity, there is no sufficient prospect of success to warrant expenditures to that end.

Alleged secret solutions permitting greater extraction of gold from low-value deposits, of which no evidence was introduced by the mining claimants showing the nature of the solutions or that they have been actually used in mining operations in recovering greater values from low-grade deposits than can be done by conventional mining methods, are not sufficient to show that expenditures would be justified with the expectation of developing a paying mine, especially where no showing has been made that minerals of such quality exist in such quantities as to make a profitable operation reasonably possible.

To satisfy the requirements of discovery on placer mining claims located for sand and gravel before July 23, 1955, it must be shown that the deposits within the limits of each claim could have been extracted, removed and marketed at a profit as of that date, and where the evidence shows that the limited market in the area had been supplied from existing sources and there is no evidence that the claims were developed for sand and gravel, the claims are properly declared null and void.

United States v. Humboldt Placer Mining Co., et al., Contest No. 10-747 (Sacramento) (June 9, 1970)

In reply refer to:
142
Contest No. 10-747
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

June 9, 1970

DECISION

United States, Contestant v. Humboldt Placer Mining Company, a corporation, and Del de Rosier, Contestees 1/	:	Ukiah, Covelo, Humboldt, White, Tannery, Tannery No. 2, Jackson, Cademartori, Furnell, Last Chance, Lewis, Enough and Faurrell placer mining claims, situated in secs. 5, 6 and 7, T. 34 N., R. 8 W.; secs. 1, 2 and 3, T. 34 N., R. 9 W.; and secs. 34 and 35, T. 35 N., R. 9 W.; all in M.D.M., Trinity County, California.

Decision Affirmed

The Humboldt Placer Mining Company and Del de Rosier have appealed from a decision of a Hearing Examiner dated March 6, 1969, which declared the above-identified placer mining claims null and void for the lack of a discovery of a valuable mineral deposit on any of the claims and which rejected the mineral patent application originally filed for the claims on November 19, 1954.

The record shows that in June 1957 the United States filed a condemnation action in the United States District Court for the Northern District of California to obtain possession of and title to certain property, including the subject placer claims, required for the construction of the Trinity River Dam and Reservoir in California. Thereafter, on May 15, 1958, the State Supervisor, Bureau of Land Management, filed a contest complaint against the subject claims. The contestees contended that jurisdiction to determine the validity of the claims was in the courts. Ultimately this question was resolved by the United States Supreme Court which held that resort to condemnation

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[1] Mr. J. O. Archibald, a sublessee of a lessee of certain of the mining claims involved, was allowed to intervene and was represented by separate counsel at the hearing. Archibald has not filed an appeal. Accordingly, whatever rights he may have had have terminated and he is no longer designated as a party to the proceeding.

in order to obtain possession of the mining claims did not preclude the United States, as titleholder, from initial adjudication of their validity by administrative procedures. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963). Meanwhile, the contestees appealed to the Secretary of the Interior from a decision rejecting their answer to an amended complaint and denying their motion to dismiss the complaint. By decision of December 16, 1964, United States v. Humboldt Placer Mining Co., and Del de Rosier, A-30055 (Supp.), the Secretary of the Interior reinstated the contest proceedings.

A second amended complaint was filed by the contestant on July 20, 1966, charging: (a) there is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery; (b) the land embraced within the claim or claims is nonmineral in character; (c) with respect to the public lands in each and all of the mining claims identified in Paragraph III of this Second Amended Complaint, contestant charges separately and collectively that each 10-acre legal subdivision or part thereof is nonmineral in character and therefore should be excluded from the respective alleged mining claims, and (d) the Cademartori placer claim, as described in the location notice, embraces incontiguous tracts of land, and is therefore contrary to law.

Contestees filed a timely answer to the second amended complaint. A hearing was held on November 28, 29, 30, and December 1, 1967, and on January 8 and 9, 1968. All parties were represented by counsel at the hearing.

The contested claims are on the south side of Stuart Fork of the Trinity River, in Trinity County, California, upstream from the recently constructed Trinity Dam. At the time of the hearing, portions of some of the claims had been inundated by water of Clair Engle Lake. The Tanney No. 2 was located in 1901, the Furnell was located in 1919, and the other eleven named placer claims were located in the 1890's. Other physical features frequently referred to are Tannery Gulch, Slate Creek, and Smith Gulch.

The geology of the area is sketched on Exhibit B in various colors. It is based upon a geological reconnaissance of the general area of the claims. The most extensive geological feature is the Weaverville formation with a reported depth where greatest of over 800 feet. It is an old Tertiary river channel which has since been bisected by streams, and has been preserved by the relative uplifting of the older

hard and resistant sediments around it. The Tertiary gravels are unconsolidated, deeply weathered, red colored clay gravels resulting from volcanic activity and reworking. The claims also expose some recent and present stream gravels, and some ultra mafic and granitic intrusive rocks. The bedrock series in the area are the Bragdon formation (Mississippian), Copley Greenstone (Devonian), and Salmon Schist.

There has been exploratory activity in the area during the past 70 years directed primarily toward the recovery of gold from the Weaverville formation and more recent stream gravels. The minerals most frequently mentioned at the hearing were gold, and sand and gravel.

We have reviewed carefully the entire record made at the hearing, the Hearing Examiner's decision, and the appellants' statement of reasons for their appeal. The testimony will be summarized herein only to the extent deemed necessary.

The Hearing Examiner's summarization of the testimony pertaining to the extensive testing of the contested claims by the contestant's mineral examiners did not mention specifically the sampling that was performed on the Cademartori, Jackson and Furnell claims. 2/ It is not to be inferred that the Hearing Examiner did not consider the testimony relating to them.

2/ Cademartori Placer Mining Claim. The claim embraced two incontiguous tracts. Contestees at the hearing abandoned one of the tracts, claiming that portion which comprises the N½NE¼ sec. 3, and the NW¼NW¼NW¼ sec. 1, T. 34 N., R. 9 W., M.D.M. (Tr. 153, 316-317.) In the retained portion of the claim three samples had been taken. A channel cut in an 8-foot bank of weathered Weaverville formation contained gold values of .8 cents per cubic yard. A pit sample from a gully in Irish Gulch revealed gold values of 1.2 cents per cubic yard. A channel sample along an old ditch showed nil. (Exhs. D-D and E-E, Tr. 460-461 and 470-471.)

Jackson Placer Mining Claim. Eight samples taken from this claim showed gold values ranging from 0.5 to 34.8 cents per cubic yard. The next highest value was 8.5 cents per cubic yard. The highest came from a test shaft put down by the mineral examiner in recent gravels in Slate Creek. (Exhs. D-D, E-E, Tr. 464, 465, 467-468, 470.)

The appellants contend that the Hearing Examiner erred by failing to give reasons for rejecting their affirmative defenses, which were set forth in their answer alleging essentially (1) that the claims were taken without just compensation in violation of the Fifth Amendment of the Constitution; (2) that the contestees were denied trial by jury; (3) that the Government should be estopped as a matter of equity from denying contestees and their predecessors in interest uninterrupted and undisturbed possession of the mining claims for some 70 years; and (4) that the Department of the Interior has no right to determine that the contestees have no rights and that their rights have no value.

Footnote 2 continued --

Furnell Placer Mining Claim. Five of the sixteen samples taken from this claim contained no gold. Six samples ranged from .3 to 1.1 cents per cubic yard. A sample from a channel cut on a slope along a road had a value of 8.3 cents per cubic yard. Four sample shafts were put down in recent gravels along Slate Creek which runs northeasterly through the claim. A sample from a shaft 2.8 feet to bedrock in sec. 3 showed a cubic yard value of 17.4 cents. In sec. 2, a shaft showed the following values per cubic yard: the top 3.2 feet, 1.4 cents; the next 4.7 feet, 42.8 cents; and the last foot in cemented Weaverville bedrock, 2.1 cents. In a third shaft the values per cubic yard were: the first 6 feet, 0.5 cents; the next 1.2 feet, 49 cents; and the last foot in cemented bedrock, 2.1 cents. The sample from the fourth test shaft which went down 3.4 feet through to cemented bedrock had a value of 67 cents per cubic yard. (Exhs. D-D, E-E, Tr. 457-469.)

George O. Scarfe, Jr., who examined these three claims, was of the opinion that the mineralization on the Cademartori claim was of such low grade, and that there was such an insufficient quantity of gravels carrying gold on the Jackson and Furnell claims that each of the claims does not warrant any further expenditures with the hope of developing a paying mine on any of them. (Tr. 478-480.)

Although the Hearing Examiner's decision discloses these allegations, no express ruling was made on them. We find, however, that the Supreme Court in Best v. Humboldt Placer Mining Co., supra, explicitly or implicitly struck down the alleged affirmative defenses when it found that the "Congress had entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. The United States, which holds legal title to the lands, plainly can prescribe the procedure which a claimant must follow to acquire rights in the public sector. " The court concluded "that the institution of the /condemnation/ suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for determining the validity of the mining claims, and the District Court acted properly in holding its hand until the issue of validity of the claims has been resolved by the agency entrusted by Congress with the task." Where a mining claim involved in a condemnation suit is administratively determined to be valid, thereafter the value of such claim for compensation purposes is within the jurisdiction of the court. This is what Justice Douglas was talking about when he said that the District Court acted properly in holding its hand, supra.

The Hearing Examiner correctly found that the testimony of the contestant's expert witnesses is based upon unusually extended and comprehensive exploratory examination conducted in accordance with accepted standard procedures and upon the assay results of the samples taken which assays were also conducted in accordance with accepted procedures. He pointed out that the testimony shows that the Weaverville formation exposed on the claims bears average gold values of .276 cents per cubic yard; that the material exposed in the slopes and washes bears average gold values of less than three cents per cubic yard; that the recent stream gravels bear average gold values of less than nine cents per cubic yard; and that the portions of the deposits of the recent stream gravels which bear greater than average gold values are extremely limited in extent. He properly found that deposits bearing such negligible gold values, or deposits with somewhat better gold values which are limited in volume, are not worthy of development since the mining costs would exceed the value of the gold which could be recovered.

The Hearing Examiner next found, and we agree, that the contestant established, prima facie, that the deposits exposed on the claims do not bear sufficient mineralization to warrant development thereof, and hence do not constitute valuable mineral deposits within the meaning of the mining laws.

The Examiner pointed out that the documentary evidence submitted by Humboldt consists of the material submitted with its application for patent, including the Yost report, and other reports made prior to 1942.

The decision appealed from properly found that the evidence of high gold values shown in the Yost report has been refuted by the contestant's evidence relating to the results of sampling conducted in the immediate vicinity of the excavations and drill holes put down by Yost. Further, since Yost was not called as a witness to support the findings related to his report, the report is properly accorded less evidentiary weight than the reports and opinions of the contestant's witnesses which were made subject to cross-examination.

The Hearing Examiner noted that the other reports submitted by the contestees as business records of the Humboldt Placer Mining Company were all prepared at least twenty-five years ago. He added that these old reports, while reflecting some significant gold values, appear to be very general in nature and were made without benefit of information which resulted from the auger and churn drilling performed on the claims by Yost and the contestant's engineers in 1959. The Examiner then found, and we concur, that, since the reports and opinions of the contestant's witnesses are based on more extensive and more recent exploratory information, those reports are accorded much greater weight than the opinions and old reports submitted by the contestees.

The Hearing Examiner stated that the fantastic gold values reported by Gibson were based on surface samples taken over a five hour period, as contrasted with the extensive exploration program conducted by the contestant involving several man-years. The samples were assayed by the so-called Douglas process involving the use of unidentified solutions. He rightfully pointed out that there is no supporting evidence of the nature of the unidentified solutions or positive evidence of the process by which the gold could be recovered, and that gold values averaging one hundred dollars per cubic yard, consisting of either coarse or microscopic particles, would surely be identified by normal fire assay. It was his opinion that the Douglas tests reflecting average gold values of one hundred dollars per cubic yard, and as high as two hundred dollars in gold per cubic yard of material in place, are simply unworthy of belief.

The decision below pointed out that a considerable portion of the contestees' evidence was devoted to the contention that valuable deposits of sand and gravel occur on the claims, and properly found that substantial deposits of material suitable for fill and subbase in highway construction and more limited deposits of recent stream gravels suitable for use as concrete aggregate occur on the claims. The decision appropriately stated that these deposits do not constitute

valuable mineral deposits unless they are shown to be marketable. The Hearing Examiner correctly found that there is no evidence in the record that there has ever been any demand for the subject sand and gravel deposits, or that any portion thereof has ever been removed from the claims for use in concrete aggregate or for any other purpose. He added that the fact that there is a limited annual market in small towns in Northern California which have other existing sources of supply, and the possibility of the future construction of highways and dams in the area, do not constitute evidence of a demand for these particular deposits. He concluded, and we concur, that in the absence of more specific evidence that these particular sand and gravel deposits could have been removed and disposed of at a profit on or before July 23, 1955, it must be concluded that the same do not constitute valuable mineral deposits within the meaning of the mining laws.

The Hearing Examiner properly explained that an applicant for a mineral patent has the burden of proving a valid discovery at the time his application is filed, citing Cole v. Ralph, 252 U.S. 286 (1920); Best v. Humboldt Placer Mining Co., supra, and he found that the contestees have failed to sustain that burden. He also found, and we agree, that:

> The contestant has established by an overwhelming preponderance of the more credible evidence adduced at the hearing that valuable minerals have not been found on any of the claims of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

The Examiner then concluded that no valuable mineral deposits have been exposed within the limits of any of the contested claims and declared each of them invalid. He made no ruling on the other charges.

Appellants allude to their having a possessory right. In that regard, under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein. While he is in possession of the land , he is not regarded as a trespasser because he is on the land with the tacit consent of the Government. However, when the Government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against the claim, the

claimant must show that he has made a discovery of valuable mineral deposits within the limits of his claim in order to retain that possession. United States v. Everett Foster et al., 65 I.D. 1 (1958).

Appellants maintain that the Department of Agriculture is not a proper party to this contest. The contested claims embrace public lands some of which are administered by the Department of Agriculture by reason of being situate in a national forest, and the remainder are administered by the Department of the Interior. In these circumstances, it is proper for both departments to join in the prosecution of the contest. United States v. San Juan Exploration Co., A-30965 (March 27, 1969).

Under the mining laws of the United States, 30 U.S.C. § 21 et seq. (1964), a discovery of a "valuable mineral deposit" within the limits of a mining claim is essential to its validity. The mining statutes do not specifically define a "discovery," but it has been held that one exists

> /W/here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905).

This has come to be known as the "prudent man test." Only when this test is satisfied can it be said that a discovery has been shown. The Supreme Court in Chrisman v. Miller, supra, in further describing what constitutes an adequate or valid discovery under the mining laws, quoted an earlier statement of Justice Field that:

> The mere indication or presence of gold or silver is not sufficient * * *. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. 197 U.S. at 322 (Emphasis added).

It is obvious that the finding of just some mineral will not do. Further, if the quality and quantity of the mineral found would justify further exploration but not development, then the test has not been met and a discovery has not been shown. Converse v. Udall, 399 F.2d 616, 620 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

When the Government contests a mining claim on public lands, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the mining claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The courts recently have made it abundantly clear that the test of what is a "valuable mineral deposit" involves consideration of economic values. In discussing the "prudent man test" and the phrase "valuable mineral deposits" as it appears in the mining statutes, the Supreme Court said:

> Under the mining laws Congress had made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. (Footnote omitted.) The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test * * *." United States v. Coleman, 390 U.S. 599, 602 (1968). (Emphasis added).

More recently the U.S. Court of Appeals for the Ninth Circuit in the Converse case, supra, a case involving gold, held that the prudent man test, complemented by the marketability test, judicially approved in Coleman, supra, is applicable to all mining claims.

It is not required of a mining claimant to prove a discovery to show that he has actually engaged in profitable mining operations or even that profitable operations are assured, but it is required that there be a showing of a prospect of profit which is sufficient to invite reasonable men to expend their means in attempting to reap that profit by extracting and marketing the mineral, as distinguished from evidence of value which will entice men to invest their money only to gain control over land and hold it in the hope or expectation that at a future date the land may be found to be valuable for the minerals which it contains. United States v. Bryan Gould, A-30990 (May 7, 1969), and case cited therein.

The present marketability test, which is a refinement of the prudent man test, requires a showing that the mineral in question can be extracted, removed, and presently marketed at a profit. This present

marketability, as to materials of widespread occurrence, can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. Foster v. Seaton, 271 F.2d 836 (D.C. Cir . 1959). Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1964), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could be extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968).

The Government when it contests a mining claim undertakes only to show that the discernible evidence of mineralization is insufficient to constitute a discovery. The Government is not obligated to provide affirmative proof either that the land embraced in a mining claim is nonmineral in character or that no discovery has been made. A Government mineral examiner is under no obligation to make such an exhaustive search of the land and test of the minerals as would normally be done by a prospector. Rather, his function is one of verifying, if possible, the claimed discovery. United States v. Frank Coston, A-30835 (February 23, 1968), and cases cited; United States v. Byran Gould, supra.

Appellants contend that the Government's samples were not taken in accordance with accepted standards in that they were not drilled or otherwise taken down to bedrock. There is no merit to this contention. Many of the Government samples did go down to bedrock. In those instances where bedrock was not reached, the Government mineral examiners went as deep or deeper than the contestees or their lessees did in their sampling. Nothing more was required, as the purpose of the Government's examination of a mining claim is to verify what the mineral claimant has exposed. We agree that the proper procedure for a prospector or claimant in order to best evaluate his claim, is to go down to bedrock, but even that in some instances may not be economically feasible for him. In any event, we concur with the Hearing Examiner's finding in that the mining engineers and geologists who testified for the Government had comprehensively tested the claims for the purposes of verification in accordance with acceptable procedures. We add that each fulfilled his function of attempting to verify the claimed discoveries, and their testimony established a prima facie case for the Government.

It is urged by appellants that the sampling procedures of the Government were incorrect as they included the silt and topsoil and as a result

the values were diluted. It is standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, and in taking samples by churn or auger drilling to include the overburden in arriving at the mineral values for the cost of removal including the removal of the overburden is a factor in determining whether a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. Robert W. Carnes, A-28178 (May 23, 1960). It is not unlike the adjustment of values in lode claims to a minable width in order to obtain realistic values. United States v. Jesse W. Crawford, A-30820 (January 29, 1968), fn 4.

It is asserted that the Hearing Examiner erred in failing to consider the volume of gravel over the entire length of Tannery Gulch. This assertion is without merit. Each mining claim stands by itself with regard to the demonstration of a discovery. Tannery Gulch extends for a considerable distance in its northeast-southwest trend and is covered by many mining claims, most of which are not involved in this contest. Therefore, the Hearing Examiner properly did not consider the volume of mineral bearing gravel over the entire length of the gulch. Valuable mineral deposits must be found within the limits of each mining claim. 30 U.S.C. § 23, 35 (1964). A discovery on one claim does not inure to the benefit of another. United States v. Charles H. Henrikson et al., 70 I.D. 212, 215 (1963), Aff'd Henrikson v. Udall, 229 F. Supp. 510 (D. Cal. 1964), aff'd 350 F.2d 949 (9th Cir. 1965), cert. denied 380 U.S. 940 (1966).

Appellants maintain that the Hearing Examiner rejected contestees' Exhibits 7, 8, 10 and 11, the reports of Percy, Yost, Hubbard and Lowden, respectively. The Hearing Examiner did not reject them. He explained that he gave little weight to the Yost report because Yost was living at the time of the hearing in Sacramento and was not called upon to testify as to his examination and report on the claim. As to the other reports, submitted as business reports of Humboldt, prepared more than 25 years ago without benefit of the results of the more recent auger and churn drilling performed in 1959, the Examiner pointed out that since the reports and opinions of the contestant's witnesses are based upon more extensive and more recent exploratory information, they are accorded greater weight than the opinions and older reports submitted by the contestees. It is a proper function of a Hearing Examiner, the finder or trier of fact, to assess the weight of evidence in considering the whole of the evidence presented at the hearing. United States v. Evelyn M. Kiggins et al., A-30827 (July 13, 1968), Fn. 5; United States v. Taylor T. Hicks et al., A-30780 (October 24, 1967).

Appellants aver that the Government presented no evidence concerning the Faurrell claim. This averment has no merit. The Hearing examiner's decision at page 8 refers to the fact that this claim embraces two incontiguous tracts and sets out the results of the sampling conducted on the claim by the Government which are shown in Exhibits U and G, respectively. The testimony of Mining Engineer Middleton, who examined the claim, appears in the transcript at pages 299-304, 330, 333, 336 and 340.

Appellants take issue with the Hearing Examiner characterizing as fantastic the reported values in Gibson's samples, which were assayed by the so-called Douglas process involving the use of unidentified solutions. We note the contrast between the values reported in Gibson's samples and those in the Government's samples, which difference apparently prompted the Hearing Examiner's statement. The novel "assay" process allegedly recovers invisible gold values presumed lost by standard assaying methods. This new process is in its experimental stage as shown by Gibson's testimony and requires further refinement. There has been no comparison by the contestees using portions of the same samples to show the results obtained by the novel process and the results that could be obtained by standard fire assay. Neither has it been demonstrated that this laboratory-type extraction technology is economically feasible in a commercial operation. The cost estimates of such an operation are all hypothetical as there has never been such operation upon which to base testimony of actual costs, and the cost of the secret solutions is based solely on hearsay. Moreover, there has been no showing that there is a sufficient quantity of material within the limits of any claim containing these alleged high invisible gold values which would support such an operation. As a consequence, the claimants have not established that the novel extraction process when applied to the material on these lands would justify a person of ordinary prudence in risking his labor and means with a reasonable expection of developing a valuable mine. United States v. New Jersey Zinc Co., 74 I.D. 191 (1967).

With regard to the claimants' contention that valuable deposits of sand and gravel occur on the claims, it is asserted on appeal that marketability was not presented as an issue in the second amended complaint. Appellants cannot claim surprise. The record indicates that the claimants at a prehearing conference a day prior to the hearing asserted that there are valuable deposits of sand and gravel on the claims. The record also shows that appellants were aware that the marketability of the sand and gravel would be an issue in the case, as one of their witnesses, James R. Miller, was a marketing consultant, who

testified that he made a study of the market potential of sand and gravel. (Tr. 690-749.) In any event, as was stated in Coleman, supra, the marketability test is a logical complement to the prudent man rule in determining whether the requirements of a discovery have been met.

Mr. Nielson, a Government mining engineer, testified that he studied the sand and gravel situation in Trinity County, where the subject claims are located. (Tr. 957.) He testified that sand and gravel in Trinity County is quite an abundant commodity. They have a very fine quality of gravel, the primary source lying along the Trinity River and its tributaries. Much gravel has been derived from old hydraulic mines that were worked. These mines added the quality of upgrading to it. Also gravel along the banks and bars of the Trinity River is of rather good quality, by reason of having traveled many miles most of the softer constituents are missing. (Tr. 958.) He mentioned that in this general area a sand and gravel plant capable of supplying specification concrete aggregate is operating at Douglas City and supplying the needs of the area. Farther to the north is a small plant which operates intermittently supplying local demand, but the plant is not adequate for the production of highway specification concrete aggregate. With regard to gravel from the Weaverville formation, he stated that as a general rule the Weaverville formation is both too dirty and too soft due to weathering to make concrete aggregate, although it could be used for sub-base and fill material. He also testified that the market is so limited that the two producers mentioned adequately supply it. He pointed out that the biggest handicap is the remoteness of some of the market requiring a long haul, as the places are so remote and small that they cannot support a plant of their own. (Tr. 959-962.)

Mr. Miller, testifying for the contestees, stated that he did not examine the sand and gravel on the contested claims, but made a study of the market potential for sand and gravel in the State of California and in the United States, that he had talked with one sand and gravel producer in the area of the claim, and that he had studied all the available literature on the subject. He testified that there has been a market for sand and gravel in Trinity County since 1850, that there was a pronounced increase in that market in the last two decades, and that the peak year was 1957. He added that the increase was due to the development of highways and roads. He expressed the opinion that there was an existing market for gravel in July 1955, and there is a market at the present time. (Tr. 702.) He explained that the existing market would involve primarily road use and then in the future at intermittent times a large temporary demand for other types of public works, construction, primarily dams, paving areas, improved Forest Service camps and this type of thing, including general construction use. (Tr. 707.)

The issue is whether the sand and gravel on the subject claims could be extracted, removed and marketed at a profit on or before July 23, 1955, the date on which Congress withdrew common varieties of sand and gravel from location under the mining laws, supra. The record contains no evidence that there was as of the critical date or since, a demand for the sand and gravel deposits on the subject claims. The fact that there was general limited market for sand and gravel in the area which was supplied from existing sources does not constitute evidence of a demand for these particular deposits. Furthermore, the record is barren of any evidence that these claims were ever developed for sand and gravel. The lack of proof of sales of sand and gravel from the claims as of July 23, 1955, or since, although not decisive of the issue of marketability, suggests that certain factors must have been involved that prevented the sale; i.e., it is indicative that the materials on the claims could not have been extracted, removed, and marketed at a profit as of that date or since. United States v. Alfred N. Verrue, 75 I.D. 300 (1968).

It is argued on appeal that the contested claims contain impervious fill material which is suitable for earth dam construction purposes and, therefore, the fill material "has some property giving it distinct and special value." There was general testimony to the effect that the Bureau of Reclamation had tested many places in the vicinity of Trinity River for impervious fill material, including some of the subject claims, for use in the construction of Trinity Dam. It was disclosed that fill material from sources closer than these claims was used in the construction of that dam. Materials used for fill purposes are not subject to location under the mining laws. United States v. William M. Hinde et al. A-30634 (July 9, 1968), and cases cited. The fact that there may have been temporary local demand for fill material with the property of being impervious, does not make it locatable (Holman v. Utah, 41 L.D. 314 (1912) or make it other than a common variety of material. Even if such material was locatable or is considered to be an uncommon variety, the requirements for a discovery have not been met in view of the lack of demand and lack of bona fides in development, as stated above.

We conclude, as did the Hearing Examiner, that the contestees have failed to meet the burden of proof upon them to show by a preponderance of the evidence that a valid discovery has been made on each and any of their claims.

Accordingly, the decision appealed from is affirmed. 3/

Humboldt Placer Mining Co., and Del de Rosier, have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $65. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party is to be served through:

1. Regional Solicitor
U. S. Department of The Interior
Room E 2753
2800 Cottage Way
Sacramento, California 95825

2. Attorney in Charge
Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Frances A. Patton

Acting Chief, Office of Appeals and Hearings

Enclosures 2

3/ Patent application Sacramento 049136, which included the subject claims, was closed out by a Bureau decision dated August 18, 1969, dismissing an appeal for failure to file a statement of reasons for the appeal within the extended period allowed for filing. As no appeal was taken from that decision, it has become final.

DISTRIBUTION:

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Mr. Del de Rosier, Sacramento, California
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Office of the General Counsel, Div. of Lands and Forestry, U.S. Dept.
  Agric., Wash., D. C.
Regional Forester, Forest Service, U.S. Dept. of Agric. San Francisco, Calif.
Div. of Watershed Management, Forest Service, U.S. Dept. of Agric.
  Wash. D.C. (12)
200
300
(6)
Gower Federal Service
Appeals List No. 1

Mining Claims: Common Varieties of Minerals 3511

Decomposed granite suitable for subbase for highways and for construction of driveways which compacts easily and requires a minimum amount of processing before being used but which is used only for the same purposes as other widely available, but less desirable, deposits of similar materials, is a common variety of mineral material and not locatable under the mining laws since the act of July 23, 1955, 30 U.S.C. § 611 (1964), as these facts do not give it a special, distinct value.

Mining Claims: Discovery 3413

In order to satisfy the requirement for discovery on a mining claim located for common varieties of decomposed granite prior to July 23, 1955, it must be shown that the materials could have been extracted, removed, and marketed at a profit prior to that date, and where mining claimants have failed to prove by a preponderance of the evidence that materials from their claims could have been extracted, removed, and marketed at a profit prior to that date, the claims are properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

Mining Claims: Generally 3400

The so-called "marketability rule," which was formulated by the Department and approved by the Supreme Court, is not such a rule as is required to be published in the Federal Register in accordance with the Administrative Procedure Act (5 U.S.C. § 552).

Mining Claims: Hearings 3482.2

Due process in an administrative proceeding to determine the validity of a mining claim implies notice and a hearing, and it is sufficient that the claimant be afforded the opportunity to defend himself. The procedure followed by the Department in the initiation, prosecution, and deciding of contests in mining cases is in compliance with the Administrative Procedure Act (5 U.S.C. § 551 et seq. (1966)).

United States v. Leona McClenaghan et al., Contest No. Riverside 06725 (June 12, 1970)

In reply refer to:
142
Contest No. Riverside
06725

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 12, 1970

Certified Mail
Return Receipt Requested

DECISION

United States of America, Contestant	:	Involving the Lucky Ridge Nos. 1, 2, 3, and 4 placer mining claims, located in Sec. 24, T. 11 N., R. 10 W., S.B.M., Kern County, California.
v.	:	
Leona McClenaghan, Wilbur McClenaghan, Marilyn Burgess, Dwight Burgess, Mrs. L. C. Cox, and Michael McClenaghan, Contestees	:	

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision, dated October 24, 1969, which declared their Lucky Ridge Nos. 1, 2, 3, and 4 placer mining claims null and void for the lack of a timely discovery of a valuable mineral deposit on any one of the four claims.

The contest proceeding was initiated by the Bureau of Land Management through the issuance of a contest complaint by the Manager of the Riverside District and Land office, which contained the following allegations:

a. The land embraced within the claims is nonmineral in character. [1]

b. Valuable minerals have not been found within the limits of the claims so as to constitute valid discoveries within the meaning of the mining law.

c. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

---

[1] The Examiner dismissed this allegation.

The contestees filed a timely answer denying these allegations, thus joining the issues, and hearings were thereafter held in Los Angeles, California, on June 20, 1966, and April 8, 1969. 2/

The case was developed through the testimony of witnesses and documentary evidence submitted by both parties. Mr. Fred S. Boyd, Jr., a duly qualified mining engineer employed by the Bureau of Land Management, testified for the Government. Testifying for the contestees were Mr. G. A. Schroter, a qualified mining and geological engineer, and Mrs. Leona McClenaghan, one of the contestees. From the evidence adduced at the hearings, the Examiner rendered his decision, from which the present appeal is taken.

We find from the pertinent evidence presented at the hearing that the four claims were located on January 24, 1955, for decomposed granite. They are 160-acre association placer claims and they cover the entire section 24, T. 11 N., R. 10 W., S.B.M., the Lucky Ridge No. 3 covering the SE¼ of the said section. This section is located near State Highway 58 between Mojave and Kramer Junction in Kern County, California. None of the material on the Lucky Ridge Nos. 1, 2, and 4 claims has been removed and sold. Mrs. McClenaghan testified that two sales of material were made from the Lucky Ridge No. 3 claim, both at a price of 10 cents per cubic yard in place. One sale on June 30, 1958, brought approximately $23, which would be for 230 cubic yards. The other sale on January 18, 1960, was for approximately 900 cubic yards, which, at 10 cents per cubic yard, would have brought about $90.

Mr. and Mrs. McClenaghan also own the NW¼NW¼ of section 30, T. 11 N., R. 9 W., in fee. The northwest corner of this subdivision is common to the southeast corner of the Lucky Ridge No. 3 claim. By agreement of July 11, 1955 (Ex. E), the McClenaghans authorized the California State Division of Highways to remove a maximum of 200,000 cubic yards from this fee-owned subdivision for a royalty of 5 cents a cubic yard. Mrs. McClenaghan stated that 75,000 cubic yards of material were removed under this agreement in 1956 for use on Highway 58. Highway 58 is to be converted into a freeway starting in approximately 1971, at which time there may be a potential market for the material from the fee-owned tract in section 30 and/or the subject claims in section 24.

2/ Only the Government appeared at the 1966 hearing, and presented a prima facie case. Thereafter, at the request of the contestees' counsel, the Examiner, for good and sufficient reason, agreed to hold a further hearing to permit the contestees to present their case. The continued hearing was not held until 1969, however, due to several continuances granted for justifiable reasons pursuant to contestees' requests. Both parties appeared at the 1969 hearing and were represented by counsel.

The Government's expert witness, Mr. Boyd, testified that the material on the claims is commonly found in the area and that geologic maps covering the area, which are published by the U. S. Geological Survey, show that there is an area of 12,000 acres underlain by this material within 6 miles of the subject claims. He said that the material has no special chemical or physical properties which would make it unusual, and that its only use would be as a fill or in construction of roads or driveways (I Tr. 13). [3] The market is being supplied from other sources closer to their point of use and the material is so widespread that it is not necessary to travel the distance necessary to take the material from these particular claims (I Tr. 17).

The contestees' expert witness, Mr. Schroter, referred to the material on the claims as select borrow material. He said that the material on the claims is identical to that on the fee land in section 30. He had discussed the material with the District Engineer of the California Division of Highways who informed him that although other deposits of decomposed granite are known in the Mojave Desert, these are the only ones that have been found by the Division of Highways of this quality which are commercially accessible for the proposed freeway construction, but they did find alternative sources of material which they would use only as a last resort because it had to be crushed and was rated as being of poor quality (II Tr. 13). The subject material "is a unique material for the purpose within the parameters /sic, perimeters?/ of marketability * * *." (II Tr. 20). He interpreted ten test reports (Ex. F) made by the California Division of Highways on material from the SE¼SE¼ of section 24 (a portion of the Lucky Ridge No. 3 claim) to the effect that the material will compact within the limits set by the Division of Highways, that it will stand up under the loads that they expect to be encountering, that it has a good screen analysis as mined and requires a minimum amount of processing before being used on the road, and has a higher than average sand equivalent test, although it is not suitable as a concrete aggregate, but for the minimum subgrade of the highway (II Tr. 23). This material can be found all over the Mojave Desert but it would not be marketable because of the haulage rate (II Tr. 30). Material which qualifies would bring 5 to 10 cents per cubic yard in this particular section, although the closer to the site, the higher would be the value because of transportation costs (II Tr. 37).

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[3] Refers to page number in the transcript of the 1966 hearing. As there is a separate transcript for the 1969 hearing, references to page numbers in that transcript will be designated as II Tr. (followed by page number).

The Hearing Examiner said that for a mining claim to be valid there must be a discovery of a mineral deposit of sufficient value to satisfy the prudent man rule originally enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), 4/ and reaffirmed in United States v. Coleman, 390 U.S. 599 (1968). He quoted from the Department in United States v. Benson, A-31061 (September 4, 1969), to the effect that the prudent man test has been refined by the so-called marketability test to require a showing that the mineral can be extracted, removed and presently marketed at a profit, citing United States v. Coleman, supra, and marketability can be demonstrated by a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand, and which case also held that since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1964), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. He also quoted the holding from United States v. U. S. Minerals Development Corp., 75 I.D. 127 (1968), that the 1955 act requires an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value; that possession of a unique property alone is not sufficient, but it must give the deposit a distinct and special value which may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. 5/

4/ This prudent man test is: "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

5/ In United States v. U. S. Minerals Development Corp. the Department also added (at p. 134): "The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value."

The Examiner then held the material on the subject claims to be a common variety as the contestees claimed no unique property or distinct value for the decomposed granite over and above the general run of many similar deposits in the Mojave Desert and that, as a common variety of material, it was incumbent upon the contestees to establish that there was a market for the material on the four claims on or before July 23, 1955. He further stated that the evidence showed that there was a market for up to 75,000 cubic yards of material from a site near the claims in 1956 during the improvement of Highway 58 and that there may be a market in 1971 for additional material during the construction of a freeway, and that two sales totalling 1,130 cubic yards were made from the Lucky Ridge No. 3 during 1958 and 1960, but that this evidence falls far short of establishing that the decomposed granite on any one of the four claims was marketable as of July 23, 1955.

Except for his statement that "the contestees claimed no unique property or distinct value for their decomposed granite over and above the general run of many similar deposits in the Mojave Desert," we find that the Examiner's findings of fact and conclusions of law are correct. The contestees did claim that their material has a unique property and is better for use as subbase in highway construction than other deposits in the immediate area. However, we find from the evidence that it is a common variety material within the meaning of the act of July 23, 1955, supra, because it has no unique property giving it a distinct and special value and it is used only for the same purposes as other similar deposits in the general area, namely, for subbase for highways and for driveways. Contestees' expert witness stated that there are other deposits in the area that could be used even though they would require more processing. The Department has consistently held that sand and gravel suitable for road base, asphalt mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since the act of July 23, 1955, supra, as these facts do not give them a special, distinct value. See United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965), and United States v. R. R. Hensler, Sr. et al., A-29973 (May 14, 1964).

Furthermore, the prospective or potential market for material from these claims for use as subbase in the construction of a section of a freeway scheduled to start in 1971 would be only a temporary local demand, and its use for subbase would actually amount to fill material. The Department, as long ago as 1912, held that such uses and purposes were not sufficient to make a commonplace material subject to the mining laws. In this respect, the Department said in Holman et al. v. Utah, 41 L.D. 314 (1912):

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling of low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. * * * (at p. 315).

As the decomposed granite on the subject claims is a common variety of material as defined in the act of July 23, 1955, supra, it was necessary for the claimants to show that the material could have been extracted, removed, and marketed at a profit prior to that date--the so-called marketability test--and where such a showing is not made a mining claim is properly declared null and void. This was the holding of the Department in United States v. Alfred Coleman, A-28557 (March 27, 1962), which decision was affirmed by the United States Supreme Court in 1968 in United States v. Coleman, supra, in which the Court said the present marketability test "is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable.' It is a logical complement to the 'prudent man test' which the Secretary /of the Interior/ has been using to interpret the mining laws since 1894." Also, see Palmer v. Dredge Corporation, 398 F. 2d 791 (1968), in which the United States Court of Appeals for the Ninth Circuit approved the Department's holding that marketability had to exist prior to July 23, 1955, in order to fulfill the "present marketability" test. Certiorari was denied by the Supreme Court, 393 U.S. 1066 (1969).

We find from the evidence that the contestees have failed to show that the material from the claims in issue could have been extracted, removed, and marketed at a profit as of July 23, 1955. The sale of 75,000 cubic yards of material to the State for use on Highway 58 in 1956 under the agreement of July 11, 1955, with the State, was made from fee-owned land and not from any of the claims. This does not demonstrate that a market existed for the material from any of the claims, as it must be shown that the particular deposit itself which is claimed to be valuable can be mined and marketed at a profit. See United States v. Gene DeZan et al., A-30515 (July 1, 1968), and cases cited; United States v. John C. Chapman et al., A-30581 (July 16, 1968). The two small sales of $23 and $90 made in 1958 and 1960 from the Lucky Ridge No. 3 claim are insufficient to show that the material was marketable in 1955, and this would be so even if these sales were made before 1955. Cf. United States v. Frank Melluzzo et al., 70 I.D. 184, 188 (1963); United States v. Joe H. York and Jemima York, A-28806 (August 16, 1962).

It is true, of course, that actual sales are not the only criterion for determining marketability, but the fact of only two small sales made from one of the claims over a period of some 14 years from the time the claims were located in 1955 until the hearing in 1969 raises a strong presumption that the material was not marketable at a profit, and it also indicates a lack of bona fides in development of the claims by the claimants. Furthermore, the possibility of the State buying material from the claims for use on a section of a proposed new freeway near the claims to be started in 1971 is mere conjecture and does not establish the fact that the material from any of the claims in issue would be used. It is merely a potential or prospective market, and a prospective market, using that term in the sense of a market to be developed in the future, is not sufficient to establish the validity of a claim as of the date when a discovery was required to be shown. United States v. William M. Hinde et al., A-30634 (July 9, 1968). The holding of mining claims as reserves of sand and gravel for future development does not impart validity to the claims. See United States v. Fisher Contracting Company, John T. Katsenes, Intervenor, A-28779 (August 21, 1962); United States v. Joseph A. Schelden et al., A-29078 (April 26, 1963).

Consequently, we find that no discovery was made on any of the claims as of July 23, 1955, and, although we do not find it necessary to decide the point here, it is doubtful if a discovery existed on any of the claims at the time of the 1969 hearing.

We have hereinabove disposed of arguments raised by the contestees in their appeal in support of their contentions that the Hearing Examiner's decision is contrary to law and to the evidence.

The appellants contend that the phrase "marketability at a profit" is unconstitutional, illegal and void. The United States Supreme Court did not think so, as the court upheld the test in United States v. Coleman, supra. They also argue that the marketability test is further unconstitutional, illegal and void because it was never published in the Federal Register as required by the Administrative Procedure Act (5 U.S.C. § 552). This same point, inter alia, was urged upon the Supreme Court by the respondents in Coleman, supra, in their petition for rehearing in that case. Rehearing was denied by the Supreme Court on May 27, 1968, 391 U.S. 961. Therefore, the appellants' contention is without merit.

The appellants also allege that the Examiner's decision ignores the protective provisions of the Administrative Procedure Act, supra, and that they are denied due process of law under the Constitution. These contentions are considered to be without merit. Due process in an administrative proceeding to determine the validity of a mining claim implies notice and a hearing, and it is sufficient that the claimant be afforded the opportunity to defend himself. The appellants have not pointed to any aspect of the prosecution of this case that differs from the usual prosecution of such cases, which has long been recognized by the courts. See United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967) and the Departmental and court decisions cited. Moreover, it is well established that the procedure followed by this Department in the initiation, prosecution, and deciding of contests in mining cases is in compliance with the Administrative Procedure Act, as amended, 5 U.S.C. § 551 et seq. (1966). In support of this conclusion, also see United States v. Charles D. and Jeanne D. Haas, supra, and the cases cited therein.

As the appellants failed to prove the validity of their claims by a preponderance of the evidence, Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959), the decision below declaring the subject claims null and void is hereby affirmed.

The above-named contestees have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all four claims adversely affected by this decision the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
300 North Los Angeles Street, Room 7759
Los Angeles, California 90012

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION

Mr. George W. Nilsson, Attorney at Law (Certified)
Mrs. Leona McClenaghan
Mr. Wilbur McClenaghan
Mrs. Marilyn Burgess
Mr. Dwight Burgess
Mrs. L. C. Cox
Mr. Michael McClenaghan
Regional Solicitor
300 (6)
200
Gower Federal Service
Appeals List No. 1

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

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Mining Claims: Lands Subject to 3811 (formerly 3400.1)

A mining claim is properly declared null and void *ab initio* to the extent it has been located on lands withdrawn from mineral location by a power project classification.

Multiple Mineral Development: Verified Statements 3712.3 (formerly 3512.9)

A verified statement required under the act of July 23, 1955, is properly rejected to the extent a mining claim, in connection with which it was filed, is held null and void because it was purportedly located on lands withdrawn from mineral location.

Estate of Thomas E. Williams, Jr., deceased, et al., S 2634-C (June 23, 1970)

In reply refer to:
142
S 2634-C

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 23, 1970

Certified Mail
Return Receipt Requested

DECISION

Estate of Thomas E. Williams, deceased :
Mrs. Lucille Williams :

Gold Star Group #1, #2, and #3 mining claims

Decision Affirmed

Thomas E. Williams, deceased, and Mrs. Lucille Williams have appealed from a decision of our Sacramento land office dated December 4, 1969, which declared the Gold Star Group #1, #2, and #3 mining claims null and void *ab initio* to the extent they invade lot 2, section 15, T. 19 N., R. 6 E., M.D.M., Yuba County, California, for the reason that the said lot 2 was withdrawn from mining location under Power Project 687 prior to the time of location of the subject mining claims. The land office decision also rejected the verified statement of Williams filed pursuant to the act of July 23, 1955, 30 U.S.C. § 613 *et seq*. (1964), to the extent it referred to mining claims in the said lot 2, section 15, T. 19 N., R. 6 E.

The verified statement showed that the mining claims covered lands in lot 2, NE¼NW¼ section 15, T. 19 N., R. 6 E., M.D.M., Yuba County, California, and that the claims were located on August 19, 1940. The record shows that lot 2 section 15 was withdrawn from mineral location when it was included in Power Project 687 on January 18, 1926, and at the time the Gold Star Group of claims was located, the lands had not been restored to mineral location pursuant to Section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1964).

On appeal it is asserted that the interest of the Williams' derives from an unbroken chain of title to mining locations made prior in time to any withdrawal for powersite or any other purpose which might preclude mining locations, adverting to "Williams & Company placer mine and quartz lode claims" in lots 45 and 46, section 15, T. 19 N., R. 6 E., located in August 1892. 1/ They contend their present title is paramount to that of the United States.

1/ The records indicate that a mineral patent application, Marysville 386, was filed on August 10, 1892, in connection with "Williams & Co. placer mine and quartz lode claims" in lots 45, 46, Section 15, T. 19 N., R. 6 E., M.D.M. The application was cancelled July 8, 1906, for laches on the part of the applicant.

Prior to the passage of the act of August 11, 1955, 30 U.S.C. § 621 et seq. (1964), lands embraced in an existing power project withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power purposes, but prior to passage of the 1955 act, is null and void where the lands embraced in the claim had not been restored to entry under section 24 of the Federal Power Act, supra, at the time of location. Day Mines, Inc., 65 I.D. 145 (1958); John H. Lawrence et al., A-30321 (February 3, 1965). Thus, it was proper to declare the Gold Star Group #1, #2, and #3 mining claims null and void ab initio to the extent these claims invade lot 2, section 15, T. 19 N., R. 6 E., M.D.M. However, although the claims located in 1940 are void to the extent indicated, whether considered to be an original location or an amended location of an earlier claim, the appellants would not lose any rights they may have in any earlier claim to which they may have succeeded in interest. But, for the appellants to be considered as having any possessory rights against the United States with respect to such earlier claims, they will have to present evidence to establish that the claims were in fact located prior to the date of the withdrawal of the land from mining location, that the present claimants are the true successors in interest to the original claimant, having an unbroken chain of title from him, and that the lands claimed by them are the same as those originally located. If they can establish those facts, then another question will have to be considered such as whether the original claim was perfected by a valid discovery before the withdrawal, and if such discovery still is present. J. Everett Nelson, A-29174 (February 4, 1963); United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969).

In any event, the verified statement is ineffective as to the mining location attempted in 1940 on lot 2, section 15, T. 19 N., R. 6 E. It is to be noted that as a consequence of no verified statement having been timely filed identifying the alleged earlier mining location, even if it can be shown that the earlier claim is valid, and the appellants are its successors in interest, the United States has obtained the right to manage and dispose of the vegetative resources and to manage other surface resources thereof, under the provisions of the act of July 23, 1955, supra, until such time as the claims may be patented.

The decision appealed from is affirmed.

The parties named have the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim

included in the appeal. If the appeal includes all three mining claims named in this decision, the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION

Wallace T. Hyde, Attorney for appellants (Certified)
Mrs. Louise Williams
Hon. Alan Cranston, U. S. Senate
Hon. Harold T. (Bizz) Johnson, House of Representatives
200
300 (6)
Gower Federal Service
Appeals List No. 1

Mining Claims: Lands Subject to 3811

Lands which have been conveyed to the United States with a reservation of all minerals to the grantor are not subject to appropriation under the mining laws, and any mining claims located on the lands subsequent to such conveyance to the United States are properly declared null and void ab initio.

John G. Bicart et al., S 3652 (June 25, 1970)

In reply refer to:
142
S 3652

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 25, 1970

Certified Mail
Return Receipt Requested

DECISION

John G. Bicart :
Otto Hansen :
James W. Hansen :
Carl R. Bradshaw
Bennie E. Bradshaw
Harold A. Hans
Eugene Ody :
George L. Harvey :
Herb Lipps :
A. J. Simpson :

Three Ravines #2, 3 Ravins No. 2 Amended and Relocated, Twins #1, Cintny (located May 7, 1968), Cintny (located September 6, 1965), Cintny (located October 24, 1963), Benny - Gene, Three Ravins #1, Three Ravines No. 1, The Debbie Sue (located May 7, 1968), The Debbie Sue (located September 17, 1965), Mac - Faye (located May 7, 1968), Mac - Faye (located December 21, 1963), Little Otto, The Otto Elsie (located May 7, 1968), and The Otto Elsie (located September 17, 1965) lode mining claims.

Decision Affirmed

By a decision of May 18, 1970, the Sacramento, California, land office declared the above-named mining claims null and void *ab initio* as to those portions of the said claims located within the SW¼NE¼, SE¼NW¼, N½SW¼ of section 2, and all of section 3, T. 22 N., R. 5 E., M.D.M. 1/ These lands are located within the Plumas National Forest.

The case record discloses that the described lands in said section 2 were patented by the United States in 1890, and that all of section 3 was patented in 1880. These lands were reconveyed to the United States for national forest purposes by deed dated December 26, 1939, pursuant to the General Exchange Act of March 20, 1922, 42 Stat. 465, 16 U.S.C. §§ 485, 486 (1964), the grantor, Swayne Lumber Company, reserving unto itself, its

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1/ The land descriptions given in the claim location notices are too vague and general to determine exactly where the claims are located, but it appears that at least portions, if not the whole, of some of the claims are located within the described lands.

successors and assigns, all minerals in the lands. The above-named claims were located on varying dates in 1954, 1963, 1964, 1965, and 1968.

The land office held that any exploitation of the mineral estate must be by the consent of the Swayne Lumber Company, its successors and assigns, in accordance with the regulations of the Department of Agriculture as provided in the deed of conveyance to the United States; also, that lands which have been conveyed to the United States with a reservation of all minerals to the grantor are not subject to appropriation under the mining laws, and any mining claim located on lands subsequent to such conveyance to the United States are properly declared null and void, citing Kenneth E. Corliss, Washington 04056-C (November 6, 1964).

The land office is correct. The mining laws are applicable only to "valuable mineral deposits in lands belonging to the United States," 30 U.S.C. § 22 (1964). It is implicit in this section that the United States must own the mineral estate because a valuable mineral deposit is the basis for a mining claim and the United States cannot authorize the disposition of something that it does not own.

James W. Hansen, in his own behalf and in behalf of co-owners, John G. Bicart and Otto Hansen, 2/ has appealed the decision below only as to two of the claims, the Three Ravines #2 as amended 3/ and the Twins #1. 4/

2/ According to information contained in the case record, James W. Hansen, John G. Bicart and Otto Hansen now appear to be the claim owners, while others holding a possible interest in one or more of the claims are the remaining persons listed in the caption of this decision. The record contains no evidence showing that service of the land office decision was obtained on Carl R. Bradshaw, Bennie E. Bradshaw, Harold A. Hans, Eugene Ody, George L. Harvey, Herb Lipps, and A. J. Simpson. Therefore, this decision does not operate as a declaration of invalidity of the claims as to any possible interest that they may have in the claims.

3/ The claim listed in the appeal as the Three Ravines #2 as amended is apparently the same claim as the first claim listed in the caption of this decision as Three Ravines #2.

4/ As James W. Hansen, John G. Bicart and Otto Hansen have appealed only as to the two claims, the decision below has become final as to their interests in the remaining claims.

The appellant contends that the location dates of the claims given in the decision below are in error as the claims were recorded as far back as 1954. Nevertheless, the subject lands have not been available to location under the mining laws since 1880 and 1890 when they were originally patented by the United States.

He states that all annual assessment work requirements were met and that the claims had not been challenged by anyone until receipt of the land office decision. This argument is not controlling, however, because so far as the government is concerned failure to do annual assessment work has no effect, Wilbur v. Krushnic, 280 U.S. 306 (1930). The doing of annual assessment work is only a protective device whereby a mining claimant protects his possessory rights in a claim from relocation by rival claimants.

Another contention is that the appellants have been paying taxes on the claims that Butte County requires. The counties generally tax lands in which one is claiming a possessory interest, including unpatented mining claims. This does not, however, impart validity to the claims as county governments have no authority to determine whether mining claims are valid or not. That authority lies only with the Department of the Interior.

The appellants further contend that, in any event, they still hold their claims through adverse possession since 1954, and that the matter of adverse possession involves only the purported owners of the mineral interests and themselves, and not the government, and the Bureau may wish to reconsider its decision to interfere in the matter. The appellants are correct in stating that the matter of adverse possession involves only themselves and the owners of the mineral estate. It is a matter that would be governed by state law, and this Department has no authority in such a case where the mineral estate is owned by private interests. However, the appellants or their predecessors in interest have located mining claims under the United States Mining Laws, and this Department does have authority to determine validity of such locations. 5/

The appellants note that the Swayne Lumber Company reconveyed the lands to the United States in 1939, reserving the minerals for a period of only 20 years. The case record does disclose that the application for the forest exchange with the Swayne Lumber Company provided that Swayne was to reserve the mineral interests to itself for a 20-year period. However, the deed,

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5/ The procedure for the appellants to follow to obtain the right to mine these lands is to secure the mineral rights in the lands from the present owners of the reserved mineral estate, and to make arrangements with the Forest Service to comply with the Department of Agriculture's regulations for mining in the national forests.

dated December 26, 1939, reserved the mineral rights without any limitation as to time. By memorandum of September 14, 1964, the Assistant Director of the Bureau of Land Management informed the California State Director as follows:

> It appears that the intention of the parties was to reserve mineral rights in the offered lands for a 20-year period. However, the deed to the United States has no such limitation. Accordingly, absent a reformation of the deed, there is no alternative but to treat the reservation as having been made in perpetuity.

Therefore, the land office decision is correct, and it is hereby affirmed.

James W. Hansen, John G. Bicart and Otto Hansen have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION

Mr. James W. Hansen (Certified)
Mr. John G. Bicart
Mr. Otto Hansen
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Appeals List No. 1